(9)

No. 00-152

Supreme Court, U.S.
FILED
DEC 4 - 2000
CLERK

In The

Supreme Court of the United States

ARTHUR S. LUJAN, et al.,

Petitioners,

vs.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

Volume II, Pages 187 to 395

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Petition For Certiorari Filed July 26, 2000
Certiorari Granted October 10, 2000

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Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CIVIL NO. 95-4839 R EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

EXHIBIT 1: Declaration of Itai Ben-Artzi

EXHIBIT 2A: Notice to Withhold re: CSU, San Bernardino

EXHIBIT 2B: Notice to Withhold re: CSU, San Bernardino

EXHIBIT 2C: Notice to Withhold re: Culver City, City Hall

EXHIBIT 2D: Notice to Withhold re: San Joaquin General Hospital

EXHIBIT 3: Declaration of Stephen A. Seideman

EXHIBIT 4: Deposition of Roger D. Miller, Volume I, December 8, 1994

EXHIBIT 5: Deposition of Roger D. Miller, Volume II, January 19, 1995

EXHIBIT 6: Deposition of Juan Garza, June 7, 1994

EXHIBIT 7: Letter, dated August 24, 1994, from Stephen A. Seideman to Division of Labor Standards Enforcement

EXHIBIT 8: Letter, dated August 25, 1995, from Jack Fleming to Division of Labor Standards Enforcement, and attached letter from California State University dated August 22, 1995

EXHIBIT 9: California Labor Code Sections 1720-1861

EXHIBIT 1

DECLARATION OF ITAI BEN-ARTZI

I, Itai Ben-Artzi, declare:

1. I am president of G & G Fire Sprinklers, Inc. (hereinafter "G&G"). I have been president of G&G since 1990.

2. G&G is a corporation organized under the laws of the State of California and qualified to do business in California. G&G is a fire protection contractor licensed as such by the Contractors License Board of the State of California.

3. G&G performs the installation of fire sprinklers systems, and related work, in buildings and structures. Generally, the work of G&G is performed in connection with new construction, or renovation of existing buildings.

4. G&G has performed work on a number of public works projects in the State of California which are governed by the laws of California. The phrase "public works project" as used herein refers to construction projects where the owner of the works of improvement is a public

entity existing pursuant to the laws of the State of California; such as a municipality or a state university. The public entity which owns the improvements constructed on such a public works project is sometimes referred to as the "awarding body". The person who enters into a contract with the awarding body for the construction of the works of improvement is sometimes referred to as the "prime contractor". The contractors who are hired by the prime contractor for the construction sometimes are referred to as "subcontractors".

5. G&G has performed work on public works projects as both prime contractor, and subcontractor. G&G intends to continue to perform work on public works projects as both a subcontractor and prime contractor.

6. The public works projects performed by G&G include projects known as CSU, San Bernardino; Culver City, City Hall; San Joaquin General Hospital; Anaheim City Public Utilities project; Moore Hall Seismic Renovation, at University of California, Los Angeles; University Center Expansion ("U-Cen"), at University of California, Santa Barbara; Rec-Center, at University of California, Santa Barbara; and the Pyramid at California State University, Long Beach.

7. Notices to withhold have been issued by the Division of Labor Standards Enforcement, State of California ("DLSE") on account of alleged violations by G&G of California prevailing wage law on a number of projects, including CSU, San Bernardino; San Joaquin General Hospital; Culver City, City Hall; Moore Hall Seismic

Renovation, at University of California, Los Angeles; University Center Expansion ("U-Cen"), at University of California, Santa Barbara; Rec-Center, at University of California, Santa Barbara; Anaheim City Public Utilities project; and the Pyramid at California State University, Long Beach, on account of alleged violations by G&G of the California prevailing wage law. G&G disputes and denies the alleged violations. The notices to withhold were not based on complaints by G&G employees.

8. G&G has been the subject of notices to withhold by DLSE on account of alleged violations of California prevailing wage law as both a prime contractor and subcontractor. For example, G&G was a prime contractor for the Anaheim City Public Utilities project for which a notice to withhold was issued, and a subcontractor for the CSU, San Bernardino project for which a notice to withhold was issued.

9. Notices to withhold by DLSE remain pending as to the CSU, Bernardino project; Culver City, City Hall project; and San Joaquin General Hospital project. The notices to withhold on the other projects have been released. G&G disputes and denies that it committed violations of California prevailing wage law. Exhibit 2 in support of this motion is a true and accurate copy of the notices to withhold which remain pending. The aforesaid pending notices to withhold were submitted by DLSE to the awarding bodies for each of the respective projects. The awarding bodies for each of the projects have withheld money from the prime contractors on account of the notices to withhold. The prime contractors for each of the respective projects have withheld payment from G&G on account of the notices to withhold.

10. There was no hearing held to determine whether there had been any violations of the prevailing wage law, or to determine the amount of wages or penalties due, prior to the issuance of any of the aforesaid notices to withhold. G&G received no notice that the notices to withhold would be issued prior to their issuance, except that as to the San Joaquin General Hospital project G&G was informed that DLSE disputed the classification of certain workers prior to the issuance of a notice to withhold.

11. On July 17, 1995, I received a copy of a notice of penalty assessment issued by DLSE for the CSU, San Bernardino project. The notice was dated July 11, 1995, and indicated that G&G had failed to respond to a request for copies of payroll reports. Payroll reports are submitted to the awarding body and/or prime contractor on all public works projects and are public records. To my knowledge, G&G had not received any request from DLSE for payroll reports. The penalty assessment was signed by Rosa Frazier, Deputy Labor Commissioner. I sent a letter dated July 17, 1995, to Ms. Frazier, stating that G&G would provide the requested information by July 21, 1995, and requested that the penalty assessment be rescinded. On July 18, 1995, I spoke by telephone with Ms. Frazier. Ms. Frazier stated that a request for certified payroll had been mailed in June to G&G, at 10305 Jefferson Boulevard, Culver City. I explained to Ms. Frazier that G&G had moved from said address in April. I reiterated that G&G would provide the requested records by July 21, 1995, and requested that the penalty assessment be rescinded. I was advised that a decision to rescind the notice of penalty assessment must be made by Roger

Miller. DLSE did not rescind the notice of penalty assessment.

12. The above penalty assessment regarding CSU, San Bernardino was served just as G&G had negotiated for final payment on the project. As a result of the notice of penalty assessment, G&G did not receive the payment as had been agreed.

13. I received a notice to withhold on the Culver City, City Hall project by or about September 29, 1995. I had no prior notice that the notice would be issued, and had received no information as to the purported basis for the notice to withhold. I have requested that DLSE provide information as to the basis of the notice to withhold, but I have received no information. I do not believe there is a proper basis for the notice to withhold.

14. As a result of the pending notices to withhold which are attached hereto as Exhibit 2, the sum of not less than $120,000 is presently being withheld from G&G.

15. Generally the price for work by a contractor on a project, including G&G, is mostly to cover the costs of performance, such as labor and materials. The issuance of notices to withhold of the types included in Exhibit 2 has a substantial detrimental effect on G&G's ability to do business. The effect of the notice to withhold is to reduce, or cut off, payments to G&G for work performed. Inasmuch as G&G intends to perform further public works projects in the future, there is a substantial and imminent threat that the issuance of additional improper notices to withhold could impair G&G's cash flow and affect its ability to do business, even to the extent that it could no longer continue to do business. The issuance of notices to

withhold by DLSE causes damage to G&G's reputation in the industry, thereby affecting its ability to obtain and to do business.

16. I have been told by officials of DLSE, including Deputy Labor Commissioner Juan Garza, that there is no right to a hearing with regard to a notice to withhold, except the right of a prime contractor to file a lawsuit under Labor Code §§ 1731-1733.

I state the above of my own personal knowledge and if called as a witness could testify competently thereto.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on October 16, 1995, at Los Angeles, California.

/s/ Itai Ben-Artzi
ITAI BEN-ARTZI

EXHIBIT 2A

[SEAL]

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement
245 W. Broadway, Room 450
Long Beach, CA 90802
(310) 499-6303

To: CAL STATE UNIVERSITY, San Bernardino
5500 University Pkwy., #127
San Bernardino, CA 92407

Date: July 11, 1995

In Reply, Refer to Case No.: 40-PW-00363/593

NOTICE OF PENALTY ASSESSMENT

(Filed Jul. 12, 1995)

Project Contract No.	Contract No. 1264/Health, P.E., Classroom, Office Facilities SB-264R, California State University, San Bernardino
Prime Contractor	CAL-PAC CONSTRUCTION, INC.
Sub-Contractor	G & G FIRE SPRINKLERS, INC.

We have been unable to obtain certified copies of payroll records concerning the above-named project.

Pursuant to Section 1778(f) of the Labor Code, you are hereby directed to withhold $750.00, per calendar day, commencing July 1, 1995, from any and all progress payments which are now or hereafter may become due to the

contractor(s) hereinafter named. The amount due as of 7-11-95, is $8,250.00.

The withholding shall continue until you are notified to the contrary by this office.

You are hereby required, pursuant to said section to withhold any and all payments which are now or hereafter may become due to the contractor herein above named to the extent of the claim as herein above shown.

I declare under perjury as follows: I am an authorized representative acting for the State Labor Commissioner. I declare that I have read the foregoing Notice of Penalty Assessment and I have made an investigation of the facts relating thereto, and based on all the facts known to me at this time and based on all of the statements and information given to me at this time, I am informed and believe that the foregoing Notice of Penalty Assessment is true and correct, and that the facts have been found to support this Notice.

Executed on July 11, 1995, at Long Beach, California.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier, Deputy Labor Commissioner

cc: Bonding Company
Prime Contractor
Subcontractor
RF/s

EXHIBIT 2B

STATE OF CALIFORNIA PETE WILSON, Governor

[SEAL]
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
Michael S. Villeneuve, Staff Attorney
245 West Broadway, Suite 450
Long Beach, California 90802-4445
Telephone No. (310) 590-5461
Telefax No. (310) 499-6367

SEP 15 1995

September 13, 1995 In Reply Refer To: LB0773

Jack W. Fleming, Esq. Fax No. (714) 252-0961
ARTER & HADDEN
2 Park Plaza, Suite 700
Irvine, CA 92714

Richard Ceccia, Esq. Fax No. (310) 985-2925
OFFICE OF GENERAL COUNSEL
The California State University
400 Golden Shore
Long Beach, CA
90802-4275

Re: Cal-Pac Construction, Inc. v. The Trustees of the California State University, et al.
San Bernardino County Superior Court Case No. SCV 22821

Gentlemen:

Transmitted herewith is a copy of DLSE's Notice to Withhold with respect to subcontractor G & G Fire Sprinklers, Inc. This Notice to Withhold supersedes the previous Notice of Penalty Assessment and serves as a release of the difference between the Notice to Withhold and any amount withheld in accordance with the Notice of Penalty Assessment.

This Notice to Withhold does not in any way impact the Notice to Withhold on Performance Construction.

If you have any questions, please contact the undersigned.

Very truly yours,

/s/ Michael S. Villeneuve
MICHAEL S. VILLENEUVE
Attorney for the Labor Commissioner

MSV:rst

Enclosure

[SEAL]

Labor Commissioner, State of California
Department of Industrial Relations
Division of Labor Standards Enforcement
245 W. Broadway, Room 450
Long Beach, CA 90802
(310) 499-6303

Cal State Univ., San Bernardino
P. O. Box 3502
Seal Beach, CA 90740-7502
Attn: George E. Owen, P.E. Constr. Engr.

Date: Sept. 13, 1995

In Reply, Refer to Case No.: 40-PW-00363/593

NOTICE TO WITHHOLD

PROJECT NAME Health, P E, Classroom, Office Fac.

PROJECT CONTRACT NO. 1264

PRIME CONTRACTORCal-Pac Construction, Inc.

SUB-CONTRACTOR G & G Fire Sprinklers, Inc.

Enclosed are a NOTICE OF WAGES OWED and NOTICE OF PENALTY ASSESSMENT pertaining to the above-named project.

You are directed to withhold and retain from any payments due the general contractor the total amount of $23,121.28 which is the sum of all wages and penalties forfeited pursuant to the provisions of Labor Code Section 1727 as evidenced by the attached Notice of Wages Owed and Notice(s) of Penalty Assessment.

If you receive notice of a suit filed by the contractor to recover the prevailing wages and/or the Penalties Labor Code Section 1731 requires you retain the above stated sum pending the outcome of the suit. If no such notice of suit is received within the 90 day period after cessation, acceptance, or completion of the project, all monies withheld shall be remitted to this office. If within the aforementioned period, the contractor consents in writing with the Notice of Wages Owed and/or Notice of Penalty Assessment, the amount withheld shall be remitted to this office.

I declare under penalty of perjury as follows: I am an authorized representative acting for the State Labor Commissioner. I execute this Declaration on behalf of the workers whose names are set forth on the attached notices. I have read the foregoing Notice to Withhold and I have made an investigation of the facts relating thereto, and based on all the facts known to me at this time and based on all of the statements and information given to me at this time, I am informed and believe that the foregoing Notice to Withhold is true and correct, and that the facts have been found to support this Notice.

Sincerely,

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier
Long Beach
PW 13

Labor Code Section 1731. If suit is brought against the awarding body within the 90-day period either by service of summons or by registered mail which is received

within the outcome of the suit, and be forwarded to the State Treasurer only in the event of a final court judgment against the contractor or his assignee. Otherwise the penalties and forfeitures are subject to any final judgment which is obtained by the contractor or his assignee. Otherwise, the penalties and forfeitures are subject to any final judgment which is obtained by the contractor or his asignee.

Date: September 13, 1995
#40-PW-00363/593

Dear Awarding Agency:

This memo is to advise that there is no provision in the Labor Code for "bonding around" a Notice to Withhold issued by the DIVISION OF LABOR STANDARDS ENFORCEMENT (DLSE).

The statutory provisions for bonding around liens are found in the Civil Code. The DLSE is not subject to the Civil Code but rather is governed by the Labor Code. See *Krueger Brothers v. San Francisco Housing Authority* (1988) 243 Cal.Rptr 585, 198 Cal App 3d 1.

There is a statutory scheme within the Labor Code which sets such a high priority on payment of wages to workers that certain Labor Code provisions enable the DLSE to enforce proper payment of wages and penalties by *mandating* that the awarding body withhold *funds* set out in the Notice to Withhold (Labor Code §1727).

The priority placed on payment of wages can be found in the last paragraph of Labor Code §1775 which

clearly states that from out of any money withheld or recovered there shall first be paid the wages due each workman.

The statutory scheme, as set out in Labor Code §§1720-1861, does not intend that DLSE enter into litigation with a Bonding Company to obtain wages and penalties which are mandated to be withheld by the awarding body. The language of Labor Code §1727 clearly states that the awarding body *"shall withhold and retain"* funds pursuant to a contract for public works. This language makes no provision for a bond. A bond is not the same thing as the awarding body retaining all funds.

Labor Code §1730 clearly mandates that the awarding body shall forward *funds* withheld pursuant to a Notice to Withhold directly to DLSE ninety (90) days after completion of the contract if no suit is filed during that time by the prime contractor. In the event the prime contractor files suit within the time frame allowed, Labor Code §1731 mandates that the *funds shall be retained* by the awarding body pending the outcome of the suit.

If the funds are not withheld by the awarding body pursuant to the Notice to Withhold but are "bonded around", then there are no *funds* to forward to DLSE per Labor Code §1730, or to *retain*, pending any suit, per Labor Code §1731.

Nowhere in the above statutory scheme is there any provision for "bonding around" the withheld funds. The only mention or provision regarding bonding in the Labor Code is for a *cash* bond allowed in Labor Code §1728 which is restricted to cases of contracts with assessment or improvement districts.

Labor Commissioner, State of California
Department of Industrial Relations
Division of Labor Standards Enforcement
245 W. Broadway, Room 450
Long Beach, Ca 90802
(310) 499-6303

[SEAL]

Cal State Univ., San Bernardino
P. O. Box 3502
Seal Beach, CA 90740-7502
Attn: George E. Owen, P.E. Constr. Engr.

Date: September 13, 1995 In Reply, Refer to Case No: 40-PW-00363/593

NOTICE OF WAGES OWED

PROJECT NAME
Health, P E, Classroom, Office Fac.

PROJECT CONTRACT NO. 1264

PRIME CONTRACTOR
Cal-Pac Construction, Inc.
SUB-CONTRACTOR
G & G Fire Sprinklers, Inc.

Please take notice that the person(s) named on Exhibit "A", attached hereto and made a part hereof, have performed labor as stated on Exhibit "A" for the sub-contractor or general contractor, named above, or other person(s) acting by your authority on the work of improvement in progress or being completed at your property at the project shown above.

Total value of the labor so performed is the sum of $_____ TO BE DETERMINED _____, and no payments have been made for the foregoing labor except as

indicated on Exhibit "A", and there now remains due, owing and unpaid $1,771.28 after deducting all just credits and offsets. The labor was performed for and furnished to the above named general contractor on the above named project.

This Notice is given pursuant to the provisions of section 1727 of the Labor Code. You are hereby required pursuant to said section nto [sic] wjthhold any and all payments which are or hereafter may become due to the contractor hereinabove named to the extent of the total claim as hereinabove shown.

Executed on September 13, 1995, at Long Beach, CALIFORNIA.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier
Long Beach

PW14

EXHIBIT 11

005

PUBLIC WORKS AUDIT WORKSHEET

EMPLOYER/FIRM			DEPUTY	OFFICE	TOTAL AMT
G & G Fire Sprinklers, Inc.			Rosa Frazier	Long Beach	312
ADDRESS	CITY		TRANSCRIBER		WAGES DU
5965 Washington Bl.	Culver City, CA 90232				1731
PROJECT	AWARDING BODY	PRIME	AUDIT NUMBER/CASE NUMBER		PENALTIES
Health, P E, Classroom, Cal	St Univ., San Bernardino	Cal-Pac Construction, In	40-PW-00363/593		1351
					TRAINING F
					3

EMPLOYEE	CLASSIFICATION	PERIOD WORKED	HOURS WORKED ST.	OT.	D.T.	OTHER WAGES PAID	TOTAL WAGES PAID	PREVAILING WAGE REQUIREMENTS OTHER	TOTAL WAGES	AMOUNT OWING AND UNPAID	PENALTIES NO.1	PENALTIES NO. 2
Shlomi Ifrah	Spnklr Fitter		52.5	0	0	19.58	1477.51	0.00	1761.38	283.87	550.00	(
Allen M. Hoff	Spnklr Fitter		56	0	0	0.00	1555.12	0.00	1878.80	323.68	350.00	(
Gabriel Ybarra	Spnklr Fitter		48	0	0	120.00	600.00	0.00	1610.40	1010.40	300.00	(
Hen Hatzroni	Spnklr Fitter		21	0	0	0.00	583.17	0.00	704.55	121.38	150.00	(
			0	0	0	0.00	0.00	0.00	0.00	0.00	0.00	(

Labor Commissioner, State of California
Department of Industrial Relations
Division of Labor Standards Enforcement
245 W. Broadway, Room 450
Long Beach, Ca 90802
(310) 499-6303

[SEAL]

Cal State Univ., San Bernardino
P. O. Box 3502
Seal Beach, CA 90740-7502
Attn: George E. Owen, P.E. Constr. Engr.

Date: September 13, 1995 In Reply, Refer to Case No: 40-PW-00363/593

NOTICE OF PENALTY ASSESSMENT

PROJECT NAME	PROJECT CONTRACT NO.
Health, P E, Classroom, Office Fac.	1264

PRIME CONTRACTOR
Cal-Pac Construction, Inc.
SUB-CONTRACTOR
G & G Fire Sprinklers, Inc.

This office has determined that the above-named contractor(s) has failed to pay the prevailing wages as required by Labor Code Sections 1774 and 1815 to laborers and/or mechanics engaged in the execution of the above public works contract. Therefore, the following assessment is made as per Labor Code Sections 1775 and 1813:

27 Penalties for straight time work paid at less than the prevailing wage rate at $50.00 per worker per day per violation equals $1,350.00

__0__ Penalties for overtime work paid at less than the prevailing wage rate at $25.00 per worker per day per violation equals $0.00.

800 Penalties for failure to keep and/or furnish required payroll records at $25.00 per worker per day per violation equals $20,000.00

827 Total number of violations. Total sum due $21,350.00

This notice is given pursuant to the provisions of Section 1727 of the Labor Code. You are hereby required, pursuant to said section to withhold any and all payments which are now or hereafter may become due to the contractor hereinabove named to the extent of the total claim as hereinabove shown.

Executed on September 13, 1995 at Long Beach, California.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier
Long Beach
PW 16

cc: Prime Contractor
Subcontractor
Bonding Company

Labor Commissioner, State of California
Department of Industrial Relations
Division of Labor Standards Enforcement
245 W. Broadway, Room 450
Long Beach, Ca 90802
(310) 499-6303

[SEAL]

CAL-PAC CONSTRUCTION, INC.
6076 Bristol Pkwy., Ste. 106
Culver City, CA 90230

Attn: Anthony J. Espinoza, Sr.
Vice President

Date: September 13, 1995 In Reply, Refer to Case No: 40-PW-00363/593

Notice of Payment Due

PROJECT NAME
Health, P E, Classroom, Office Facilities
PRIME CONTRACTOR
Cal-Pac Construction, Inc.
SUB-CONTRACTOR
G & G Fire Sprinklers, Inc.

PROJECT CONTRACT NO. 1264

This Division has completed an investigation into the payment of wages to employees of the contractor named above while employed on the above Public Works Project. The investigation revealed the following violations of the California Labor Code by contractor:

1. $ 1,739.33 Wages determined to be due based on the failure of the contractor to pay the prevailing wage and/or for the actual number of hours worked by employees on the job. Labor Code Section 1774.

2. $ 1,350.00 Penalty due for paying less than the stipulated prevailing rates. 27 Violations at $

50.00 per violation. Labor Code Section 1775.

3. $20,000.00 Penalty due for failure to keep and/or furnish required payroll records. 800 Violations at $25.00 per violation. Labor Code section 1776 (g).

4. $_____ Penalty due for failure to comply with working hours requirements. Violations at $25.00 per violation. Labor Code Section 1813.

5. $ 31.95 Training fund contributions determined to be due. Classification/Worker Fire Sprinkler Fitter.

6. TOTAL AMOUNT DUE AND PAYABLE. $23,121.28

Demand is hereby made for the total amount as shown above. Payment shall be expected within ten days. If these amounts are disputed, advise this office in writing within ten days as to the basis of the dispute and remit any amounts you concede to be due.

This letter also constitutes a notice to cease and desist violations previously noted.

Continued violations of this type will result in additional unpaid wages becoming due and additional penalties assessed under Labor Code Sections 1775, 1776, and 1813.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier
Deputy Labor
Commissioner
PW 17
RF/s

cc: Subcontractor
Bonding Company
Awarding Body

EXHIBIT 2C

LABOR COMMISSIONER STATE OF CALIFORNIA
Department of Industrial Relations
Department of Labor Standards Enforcement
BUREAU OF FIELD ENFORCEMENT
~~COUNTY BROADWAY, SUITE 9029~~
6150 Van Nuys Bl. #100
LOS ANGELES, CA ~~90012~~ 91401
~~[illegible]~~ (818) 901-5697

[SEAL]

AWARDING BODY:

City of Culver City
c/o JCM Group
10866 Wilshire Bl. #600
Los Angeles, CA 90024-4303

IN REPLY, REFER TO CASE NUMBER:
9-22-95 40-00858/189

NOTICE TO WITHHOLD

[ILLEGIBLE] NAME/CONTRACT NUMBER
City Hall – Culver City/Project No. R-4004

CONTRACTOR
Huber, Hunt & Nichols, Inc.

CONTRACTOR
G & G Fire Sprinklers, Inc.

Enclosed are a NOTICE OF WAGES OWED and NOTICE OF PENALTY ASSESSMENT pertaining to the above-named project.

You are directed to withhold and retain from any payments due the general contractor the total amount of $48,314.64, which is the sum of all wages and penalties

forfeited pursuant to the provisions of Labor Code Section 1727 as evidenced by the attached Notice of Wages Owed and Notice(s) of Penalty Assessment.

If you receive notice of a suit filed by the contractor to recover the prevailing wages and/or the Penalties, Labor Code Section 1731 requires you retain the above stated sum pending the outcome of the suit. If no such notice of suit is received within the 90 day period after cessation, acceptance, or completion of the project, all monies withheld shall be remitted to this office. If within the aforementioned period, the contractor consents in writing with the Notice of Wages Owed and/or Notice of Penalty Assessment, the amount withheld shall be remitted to this office.

I declare under penalty of perjury as follows: I am an authorized representative acting for the State Labor Commissioner. I execute this Declaration on behalf of the workers whose names are set forth on the attached notices. I have read the foregoing Notice to Withhold and I have made an investigation of the facts relating thereto, and based on all the facts known to me at this time and based on all of the statements and information given to me at this time. I am informed and believe that the foregoing Notice to Withhold is true and correct, and that the facts have been found to support this Notice.

Sincerely,

STATE LABOR COMMISSIONER

By /s/ Larry Loughlin
Larry Loughlin, LSI

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement
~~[illegible] South Broadway, Rm 5029~~
6150 Van Nys Bl. #100
Los Angeles, CA ~~90012~~ 91401
(818) 901-5697

TO:
City of Culver city
c/o JCM Group
10866 Wilshire Bl. #600
Los Angeles, CA 90024-4303

DATE: 9-22-95 In Reply, Refer to Case Number: 40-00858/189

[SEAL]

NOTICE OF WAGES OWED

Contract Number No. R-4004

Sub-Contractor
G & G Fire Sprinklers, Inc.

General Contractor
Huber, Hunt & Nichols, Inc.

Project Name and Adress
City Hall – Culver City

Please take notice that the person(s) named on Exhibit "A", attached hereto and made a part hereof, have performed labor as stated on Exhibit "A" for the sub-contractor or general contractor, named above, or other person(s) acting by your authority on the work of improvement in progress or being completed at your property at the project shown above.

Total value of the labor so performed is the sum of $41,514.64, and no payments have been made for the foregoing labor except as indicated on Exhibit "A", and there now remains due, owing and unpaid $41,514.64 after deducting all just credits and offsets. The labor was performed for and furnished to the above named general contractor on the above named project.

This Notice is given pursuant to the provisions of section 1727 of the Labor Code. You are hereby required pursuant to said section to withhold any and all payments which are or hereafter may become due to the contractor hereinabove named to the extent of the total claim as hereinabove shown.

Executed on 9-22-, 1995, at Van Nuys, California

STATE LABOR COMMISSIONER

By /s/ Larry Loughlin
Larry Loughlin, LSI

LABOR COMMISSIONER STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement
BUREAU OF FIELD ENFORCEMENT
~~[illegible] BROADWAY, SUITE 5029~~
6150 Van Nuys Bl. #100
Los Angeles, CA ~~90012~~ 91401
(818) 901-5697

[SEAL]

WARDING BODY:
City of Culver City
c/o JCM Group
10866 Wilshire Bl. #600
Los Angeles, CA 90024-4303

DATE: 9-22-95 IN REPLY, REFER TO CASE NUMBER:
40-00858/189
[SEAL]

NOTICE OF PENALTY ASSESSMENT

NAME / CONTRACT NUMBER
City Hall – Culver City / No. R-4004

CONTRACTOR
Huber, Hunt & Nichols, Inc.

SUB-CONTRACTOR
G & G Fire Sprinkler, Inc.

This office has determined that the above-named contractor(s) has failed to pay the prevailing wages as required by Labor Code Sections 1774 and 1815 to laborers and/or mechanics engaged in the execution of the above public works contract. Therefore, the following assessment is made as per Labor Code Sections 1775 and 1813:

136 Penalties for straight time work paid at less, than the prevailing wage rate at ~~$25.00~~ 50.00 per worker per day per violation equals $6800.00.

___ Penalties for overtime work paid at less than the prevailing wage rate at $25.00 per worker per day per violation equals $_____.

136 Total number of violations

Total sum due $6800.00.

This Notice is given pursuant to the provisions of Section 1727 of the Labor Code. You are hereby required, pursuant to said section to withhold any and all payments which are or hereafter may become due to the contractor herein above named to the extent of the total claim as hereinabove shown.

Executed on 9-22, 1995, at Van Nuys, California.

STATE LABOR COMMISSIONER

By /s/ L Loughlin
Larry Loughlin, LSI

cc: Prime Contractor
Subcontractor
Bonding Company

P.S.17

FIRM	EMPLOYEE	SOCIAL SECURITY NUMBER	TOTAL WAGES DUE
G + G Fire Sprinklers	UNKNOW Employess		
ADDRESS	ADDRESS (NOT SHOWN ON CPR's)	PERIOD FROM: Beginning THROUGH: Completion	MINIMUM WAGES DUE
(NOTE: 1 WORKER = 8 HOURS)	Culver City City Hall Project	TRANSCRIBER AND DATE	OTHER WAGES DUE
	EXHIBIT "A"	EMPLOYEE'S OCCUPATION: Sprinklers Fitter	OVERTIME PAY DUE

PERIOD ENDING	HOURS WORKED (S—Split Shift) M	T	W	Th	F	S	S	TOTAL HOURS REG	O/T	OTHER	TOTAL	RATE OF PAY	WAGES PAID REG	O/T	OTHER	TOTAL	REQUIRED WAGES REG	O/T	OTHER	TOTAL	ADJUSTMENT DUE
	4	5	6	7	8	9	10														
+-8.94			8	8	8						24	37.96									911.04
	11	12	13	14	15	16	17														
4-16	8	16	16	8	8						56										2125.76
	18	19	20	21	22	23	24														
4-22	8	9	16								32										1214.72
	9	10	11	12	13	14	15														
5-14			16								16										607.36
	16	17	18	19	20	21	22														
5.21				8	8						16										607.36
	23	24	25	26	27	28	29														
5-28	8	16									24										911.04
	6	7	8	9	10	11	12														
6-11		8		8							16										607.36
	13	14	15	16	17	18	19														
6-18		8	8	8	16						40										1518.40
	20	21	22	23	24	25	26														
6.-25	8	8	8	8	8						40										1518.40
	27	28	29	30	1	2	3														
7-2-94	8	8	8	8	8						40	37.96									1518.40

BEST AVAILABLE COPY

P.D.I.

FIRM	EMPLOYEE	SOCIAL SECURITY NUMBER		TOTAL WAGES DUE
ADDRESS	ADDRESS	PERIOD FROM	THROUGH	MINIMUM WAGES DUE
		TRANSCRIBER AND DATE		OTHER WAGES DUE
		EMPLOYEE'S OCCUPATION		OVERTIME PAY DUE

PERIOD ENDING	HOURS WORKED S—Split Shift							TOTAL HOURS				RATE OF PAY	WAGES PAID				REQUIRED WAGES				ADJUSTMENT DUE
	M	T	W	Th	F	S	S	REG	O/T	OTHER	TOTAL		REG	O/T	OTHER	TOTAL	REG	O/T	OTHER	TOTAL	
	4	5	6	7	8	9	10					51.345									
1-9-94			8			16		8	16		24	37.96					303.68	821.52			1125.20
	25	26	27	28	29	30	31														
7-29	8			8							16	37.96									607.36
	8	9	10	11	12	13	14														
8-12		8	8	8	8						32										1214.72
	15	16	17	18	19	20	21														
8-19	8	16		8	8						40										1518.40
	22	23	24	25	26	27	28														
8-26					8						8										303.68
	5	6	7	8	9	10	11														
9-9		8									8										303.68
	12	13	14	15	16	17	18														
9-16	16			16	8						40										1518.40
	19	20	21	22	23	24	25														
9-23	8	8	8	8	16						48										1822.08
	26	27	28	29	30	10/1	2														
9-30	16	16	16	16	16						80										3036.80
	3	4	5	6	7	8	9														
10-7	16	8		8	8						40										1518.40
	10	11	12	13	14	15	16														
10-14	8	8									16										607.36
	17	18	19	20	21	22	23														
10-21-94	8			24	8						40	37.96									1518.40

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P.7/7

FIRM	EMPLOYEE	SOCIAL SECURITY NUMBER	TOTAL WAGES DUE
ADDRESS	ADDRESS	PERIOD FROM / THROUGH	MINIMUM WAGES DUE
		TRANSCRIBER AND DATE	OTHER WAGES DUE
		EMPLOYEE'S OCCUPATION	OVERTIME PAY DUE

PERIOD ENDING	HOURS WORKED (S—Split Shift) M	T	W	Th	F	S	S	TOTAL HOURS REG	O/T	OTHER	TOTAL	RATE OF PAY	WAGES PAID REG	O/T	OTHER	TOTAL	REQUIRED WAGES REG	O/T	OTHER	TOTAL	ADJUSTMENT DUE
	24	25	26	27	28	29	30														
10-28-94	24	24	24	24	24						120	37.96									4555.20
	31	11/1	2	3	4	5	6														
11-4	16	16	8								40										1518.40
	14	15	16	17	18	19	20														
11-18					8						8										303.68
	21	22	23	24	25	26	27														
11-25-94	8										8										303.68
	16	17	18	19	20	21	22														
1-25-95		8	8	8	8						32										1214.72
	23	24	25	26	27	28	29														
1-28		8	16	16	16						56										2125.76
	30	31	2/1	2	3	4	5														
2-3	16	16									32										1214.72
	27	28	29	30	31	4/1	2														
3-31			8								8										303.68
	24	25	26	27	28	29	30														
4-28	16	16	16								48										1822.08
	8	9	10	11	12	13	14														
5-12				8							8										303.68
	15	16	17	18	19	20	21														
5-19-95		8		8	16						32	37.96									1214.72
																					14880.32

SEP 27 '95 17:13 686 TIME SAV WILERS

EXHIBIT 2D

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement
2424 Arden Way, Suite 340
Sacramento, CA 95825

[SEAL]

TO:

Stephen Keeter, Project Manager
County of San Joaquin,
Capital Projects Division
222 East Weber Ave.,
Courthouse Room 678
Stockton, CA 9520-2778

DATE: March 22, 1995 In Reply, Refer to Case Number: 32-16679/595

NOTICE OF WAGES OWED

Contract Number
R-93-622

Sub-Contractor
G&G Fire Sprinklers, Inc.

General Contractor
Perini Building Company, Inc.

Project Name and Adress
San Joaquin General Hospital Replacement
Phase 1B

Please take notice that the person(s) named on Exhibit "A", attached hereto and made a part hereof, have performed labor as stated on Exhibit "A" for the sub-contractor or general contractor, named above, or other

person(s) acting by your authority on the work of improvement in progress or being completed at your property at the project shown above.

Total value of the labor so performed is the sum of $139,777.08, and no payments have been made for the foregoing labor except as indicated on Exhibit "A", and there now remains due, owing and unpaid $71,317.08 after deducting all just credits and offsets. The labor was performed for and furnished to the above named general contractor on the above named project.

This Notice is given pursuant to the provisions of section 1727 of the Labor Code. You are hereby required pursuant to said section to withhold any and all payments which are or hereafter may become due to the contractor hereinabove named to the extent of the total claim as hereinabove shown.

Executed on March 22, 1995, at Sacramento, California

STATE LABOR COMMISSIONER

By /s/ Daniel Dellarocca
Daniel Dellarocca,
Deputy Labor Commissioner

RECEIVED
MAR 24 1995
PERINI CORP
NOTICE OF WAGES OWED

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement
Bureau of Field Enforcement
2424 Arden Way, Suite 340
Sacramento, CA 95825

AWARDING BODY: [SEAL]
Stephen Keeter, Project Manager
County of San Joaquin,
Capital Projects Div.
222 East Weber Ave.,
Courthouse Room 678
Stockton, CA 95202-2778

DATE: March 22, 1995 IN REPLY, REFER TO CASE NUMBER:
32-16679/595

NOTICE OF PENALTY ASSESSMENT

PROJECT NAME / CONTRACT NUMBER
San Joaquin General Hospital Replacement Phase 1B

PRIME CONTRACTOR
Perini Building Company, Inc.

SUB-CONTRACTOR
G&G Fire Sprinklers, Inc.

This office has determined that the above-named contractor(s) have failed to pay the prevailing wages as required by Labor Code Sections 1774 and 1815 to laborers and/or mechanics engaged in the execution of the above public works contract. Therefore, the following assessment is made as per Labor Code Sections 1775 and 1813:

451 Penalties for straight time work paid at less, than the prevailing wage rate at ~~$XXXX~~ 50.00 per worker per day per violation equals $22,550.00.

___ Penalties for overtime work paid at less than the prevailing wage rate at $25.00 per worker per day per violation equals $_____.

451 Total number of violations

Total sum due $22,550.00.

This Notice is given pursuant to the provisions of Section 1727 of the Labor Code. You are hereby required, pursuant to said section to withhold any and all payments which are or hereafter may become due to the contractor herein above named to the extent of the total claim as hereinabove shown.

Executed on March 22, 1995, at Sacramento, California.

STATE LABOR COMMISSIONER

By /s/ Daniel Dellarocca
Daniel Dellarocca,
Deputy Labor Commissioner

cc: Prime Contractor
Subcontractor
Bonding Company

EXHIBIT 3

DECLARATION OF STEPHEN A. SEIDEMAN

I, Stephen A. Seideman, declare:

1. I am an attorney licensed to practice in the State of California, and am admitted to practice in the United States District Court, Central District of California. I am an associate of Levin, Stein, Chyten & Schneider, attorney of record for Plaintiff in this action.

2. Exhibit 4 in support of this motion is a true and accurate copy of excerpts from the transcript of the deposition of Roger D. Miller, volume I. The deposition was taken on December 8, 1994, before a certified court reporter. I was present during the deposition, and conducted the questioning of the witness. The transcripts accurately set forth what was said at the deposition.

3. Exhibit 5 in support of this motion is a true and accurate copy of excerpts from the transcript of the deposition of Roger D. Miller, Volume II. The deposition was taken on January 19, 1995, before a certified court reporter. I was present during the deposition, and conducted the questioning of the witness. The transcripts accurately set forth what was said at said deposition.

4. Exhibit 6 in support of this motion is a true and accurate copy of excerpts from the transcript of the deposition of Juan Garza. The deposition was taken on June 7, 1994, before a certified court reporter. I was present during the deposition, and conducted the questioning of the witness. The transcripts accurately set forth what was said at said deposition.

5. I have practiced civil litigation in state courts in California for over ten years. I am personally familiar with the amount of time it takes to litigate a civil case in said courts, at both the trial and appellate level. Presently, it generally takes from one to two years from filing of a complaint until trial. The scheduling of trials is dependent on the court's calendar, and may sometimes take longer. For example, there has been much speculation that the "three strikes" criminal law may increase the time it takes for civil cases to get to trial. At the appellate level, cases before the Court of Appeal are typically pending from one to two years before a decision is rendered.

6. Attached hereto as Exhibit 7 is a true and accurate copy of a letter I sent requesting information as to the basis of the notice to withhold issued as to G&G for the CSU, San Bernardino project. I did not receive a response to the letter.

7. Attached hereto as Exhibit 8 is a copy of a letter dated August 28, 1995, from Jack Fleming, attorney for the prime contractor on CSU, San Bernardino, to DLSE, and a copy of a letter dated August 22, 1995, from the awarding body (i.e., the University) to CAL-PAC.

I state the above of my own personal knowledge and if called as a witness could testify competently thereto.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on October 16, 1995, at Los Angeles, California.

/s/ Illegible
STEPHEN A. SEIDEMAN

EXHIBIT 4

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

G & G FIRE SPRINKLERS, INC., PLAINTIFF, VS. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, A CORPORATION, DEFENDANT.	CASE NO. BC104623 VOLUME I

DEPOSITION OF ROGER D. MILLER

LOS ANGELES, CALIFORNIA

DECEMBER 8, 1994

* * *

[7] LOS ANGELES, CALIFORNIA; THURSDAY, DECEMBER 8, 1994; 10:20 A.M.

* * *

ROGER D. MILLER,
HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

* * *

EXAMINATION

BY MR. SEIDEMAN:

Q COULD YOU STATE YOUR NAME FOR THE RECORD, PLEASE.

A ROGER D. MILLER.

Q MR. MILLER, BY WHOM ARE YOU PRESENTLY EMPLOYED?

A STATE OF CALIFORNIA, DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS.

Q MR. MILLER, HAVE YOU EVER TESTIFIED AT A DEPOSITION BEFORE?

A YES, I HAVE.

Q ON HOW MANY OCCASIONS?

A I DON'T RECALL, BUT SEVERAL.

Q SO ARE YOU GENERALLY FAMILIAR WITH THE DEPOSITION PROCEDURE?

A YES, I AM.

* * *

[10] COMMISSIONER III.

Q AND WHERE IS YOUR OFFICE LOCATED?

A VAN NUYS, 6150 VAN NUYS BOULEVARD, ROOM 200, VAN NUYS, 91401.

Q HOW LONG HAVE YOU BEEN EMPLOYED AS A SENIOR DEPUTY LABOR COMMISSIONER III?

A AT THIS TIME APPROXIMATELY ONE YEAR.

Q WHAT WAS YOUR POSITION PRIOR TO THAT?

A I WAS A DEPUTY IV.

Q AND BY GOING FROM A DEPUTY IV TO A DEPUTY III, DID YOUR DUTIES CHANGE AT ALL?

A YES, IT DID.

Q WHAT ARE YOUR CURRENT DUTIES?

A MY CURRENT DUTIES IS RESPONSIBILITY FOR THE ENFORCEMENT OF THE PUBLIC WORKS LAWS FOR SOUTHERN CALIFORNIA, SUPERVISING THE STAFF FOR PUBLIC WORKS ENFORCEMENT.

Q AND HAVE YOU HAD THOSE DUTIES SINCE THE TIME THAT YOU BECAME SENIOR DEPUTY LABOR COMMISSIONER III?

A YES, I HAVE.

Q WHAT WERE YOUR DUTIES IMMEDIATELY PRIOR TO THAT POSITION?

A I HAD RESPONSIBILITY FOR ALL ENFORCEMENT OF THE PUBLIC WORKS LAWS, LABOR CODE, IWC ORDERS FOR SOUTHERN CALIFORNIA.

* * *

[13] TARGETING CERTAIN INDUSTRIES.

Q DID THAT INVOLVE PUBLIC WORKS?

A NO, IT DID NOT ORIGINALLY.

Q AND THEN PRIOR TO THAT, YOU WERE A HEARING OFFICER FOR TWO YEARS; IS THAT CORRECT?

A THAT'S CORRECT.

Q COULD YOU DESCRIBE GENERALLY WHAT A HEARING OFFICER DOES?

A WELL, BASICALLY, THEY HEAR CASES ON WAGE CLAIMS HAVING TO MAKE A DECISION.

Q SO IN OTHER WORDS, FOR EXAMPLE, IF AN EMPLOYEE SAID THAT AN EMPLOYER HADN'T PAID HIM HIS WAGES, THAT TYPE OF THING?

A YES.

Q AND THEN FOR SIX OR SEVEN YEARS YOU WERE A DEPUTY I OR A FIELD AGENT; IS THAT RIGHT?

A CORRECT.

Q WHAT DID THAT INVOLVE AS FAR AS DUTIES?

A DOING ALL THE INVESTIGATION. IT'S FIELD WORK, GOING OUT, ENFORCING ALL THE STATE LABOR LAWS.

Q DID THAT INCLUDE ANY PUBLIC WORKS?

A YES, IT DID.

Q AND DID THAT INCLUDE PREVAILING WAGE ISSUES RELATING TO PUBLIC WORKS?

A YES, IT DID.

* * *

[15] A A MONTH, TWO MONTHS? A MONTH OR TWO MONTHS.

Q PRIOR TO THAT AND SINCE YOU BECAME THE SENIOR DEPUTY LABOR COMMISSIONER, WAS ANYONE ELSE IN THE POSITION OF REGIONAL MANAGER?

A NO.

Q DURING THE 10 OR 11 MONTHS PRIOR TO MR. SMITH TAKING THAT POSITION OF REGIONAL MANAGER, WHO WAS YOUR IMMEDIATE SUPERVISOR?

A SIMON REYES.

Q AND WHAT IS HIS POSITION?

A ASSISTANT CHIEF.

Q AND THAT'S ASSISTANT CHIEF OF WHAT?

A DIVISION OF LABOR STANDARDS.

Q DO YOU KNOW HOW LONG HE'S HAD THAT POSITION?

A PROBABLY EIGHT OR NINE YEARS.

Q AND SO AT LEAST FOR THE LAST EIGHT OR NINE YEARS DURING THE TIME YOU WERE REGIONAL MANAGER, WAS MR. REYES YOUR IMMEDIATE SUPERVISOR?

A YES, HE WAS.

Q AND DO YOU KNOW WHO HIS IMMEDIATE SUPERVISOR IS?

A WELL, HE ANSWERS TO THE LABOR COMMISSIONER.

[16] Q AND THAT IS WHO?

A VICTORIA BRADSHAW.

Q DO YOU KNOW HOW LONG SHE HAS BEEN LABOR COMMISSIONER?

MR. SMITH: THREE.

THE WITNESS: THREE YEARS.

BY MR. SEIDEMAN:

Q AND THE LABOR COMMISSIONER IS THE HEAD OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT?

A THAT'S CORRECT.

Q IS THERE A DIFFERENCE BETWEEN THE OFFICE OF THE LABOR COMMISSIONER AND THE DIVISION OF LABOR STANDARDS ENFORCEMENT?

A NO, THERE IS NOT.

Q IN OTHER WORDS, THAT'S SORT OF TWO NAMES FOR THE SAME THING?

A YES. SOME PEOPLE LIKE TO CALL IT THE LABOR COMMISSION. SOME CALL IT THE LABOR BOARD. THE OFFICIAL TITLE IS DIVISION OF LABOR STANDARDS ENFORCEMENT. THE TITLE OF THE PERSON IS THE LABOR COMMISSIONER. THAT'S THE WAY IT'S SET UP IN THE LABOR CODE.

Q NOW, WHEN THIS CHANGE IN THE STRUCTURE WAS MADE ABOUT A YEAR AGO AND THIS POSITION WAS ESTABLISHED AS THE SENIOR DEPUTY IN CHARGE OF THE PUBLIC WORKS, WERE YOU INVOLVED IN THE PROCESS AND THE DECISION MAKING OF MAKING

* * *

[33] A WELL, YOU HAVE THE BASIC LAWS AND REGULATIONS THAT PERTAIN TO PUBLIC WORKS THAT THEY'RE REQUIRED TO FOLLOW.

Q THE BASIC LAWS REFERRING TO STATUTES IN THE LABOR CODE?

A THAT'S CORRECT.

Q AND THEN THE REGULATIONS BEING THE REGULATIONS PROMULGATED PURSUANT TO THOSE STATUTES?

A THAT IS CORRECT.

Q ARE THERE ANY WRITTEN PROCEDURES OR GUIDELINES THAT ARE TO BE UTILIZED IN CONNECTION WITH THE ISSUANCE OF A NOTICE TO WITHHOLD FOR A PUBLIC WORKS PROJECT?

A THAT WOULD BE CONTAINED IN THE MANUAL, THE PUBLIC WORKS MANUAL. I'M SURE THERE WERE SOME INSTRUCTIONS PUT OUT BY MEMOS AT ONE TIME OR ANOTHER OF HOW TO HANDLE THEM, YES.

Q INSTRUCTION PUT OUT BY WHO?

A IN MEMOS.

Q AND THE MEMOS THAT YOU'RE THINKING OF, ARE THESE MEMOS FROM YOU?

A THEY COULD HAVE BEEN, YES.

Q DO YOU THINK THAT THEY COULD HAVE ALSO BEEN FROM SOMEONE ELSE?

A THEY COULD HAVE BEEN FROM SIMON REYES, [34] YES, AND THEY COULD HAVE BEEN

FROM THE SENIOR DEPUTY THAT WAS SUPERVISING THE PEOPLE AT THAT TIME.

Q DO YOU KNOW WHETHER OR NOT YOU HAVE ANY SUCH MEMOS?

A NO, I DO NOT.

Q NO, MEANING YOU DON'T HAVE THEM OR YOU DON'T KNOW WHETHER YOU HAVE THEM?

A I DON'T KNOW WHETHER I HAVE THEM.

Q DO YOU KNOW WHO WOULD HAVE SUCH MEMOS?

A IF THEY'RE AROUND, I WOULD PROBABLY HAVE THEM.

Q ARE THERE ANY OTHER WRITTEN PROCEDURES OR GUIDELINES WITH REGARD TO THE ISSUANCE OF A NOTICE TO WITHHOLD ON A PUBLIC WORKS PROJECT?

A NOT THAT I RECALL.

Q WHAT IS THE PROCEDURE THAT IS SUPPOSED TO BE FOLLOWED WITH REGARD TO THE ISSUANCE OF A NOTICE TO WITHHOLD ON A PUBLIC WORKS PROJECT?

A WOULD YOU GO INTO A LITTLE BIT MORE DETAIL WHAT TYPE YOU'RE ASKING ABOUT.

Q WELL, LET'S ASSUME THAT THERE WAS A DEPUTY LABOR COMMISSIONER THAT WAS INVESTIGATING AN ISSUE CONCERNING PAYMENT OF PREVAILING WAGES ON A PUBLIC WORKS PROJECT.

AND IF THAT DEPUTY LABOR COMMISSIONER THOUGHT THAT A NOTICE TO WITHHOLD MAY BE APPROPRIATE, WHAT IS THE [35] PROCEDURE THAT IS SUPPOSED TO BE FOLLOWED WITH REGARD TO THE ISSUANCE OF A NOTICE TO WITHHOLD?

A CURRENTLY, THEY ARE TO GET MY APPROVAL ON THE FORM PRIOR TO ISSUING A NOTICE TO WITHHOLD.

Q HOW LONG HAS THAT BEEN THE PROCEDURE?

A THE PROCEDURE'S BEEN AROUND QUITE A WHILE THAT THEY HAVE TO GET MY APPROVAL. PRIOR TO THAT, THEY WERE SUPPOSED TO GET APPROVAL FROM THE SENIOR DEPUTY.

Q AND WHEN DID IT CHANGE IN TERMS OF GETTING APPROVAL FROM YOU AS OPPOSED TO APPROVAL FROM THE SENIOR DEPUTY?

A WELL, WHEN I BECAME A SENIOR DEPUTY IN CHARGE OF PUBLIC WORKS.

Q SO THAT'S ABOUT A YEAR AGO?

A YES.

Q SO PRIOR TO THAT, THE APPROVAL WOULD BE FROM THE SENIOR DEPUTY?

A CORRECT.

Q AND HOW LONG HAD THAT BEEN THE PROCEDURE?

A FOR SEVERAL YEARS. I CAN'T GIVE YOU AN EXACT DATE.

Q WHAT'S YOUR BEST APPROXIMATION?

A PROBABLY THREE OR FOUR YEARS.

Q AND PRIOR TO THAT PERIOD OF TIME IN WHICH YOU'VE INDICATED THAT THE PROCEDURE WAS TO GET APPROVAL OF [36] THE SENIOR DEPUTY, WHAT WAS THE PROCEDURE?

A MAINLY, IT WAS UP TO THE DEPUTY TO ISSUE.

Q PRIOR TO YOUR BECOMING SENIOR DEPUTY ABOUT A YEAR AGO, HOW MANY SENIOR DEPUTIES WERE THERE?

A HANDLING PUBLIC WORKS?

Q YES.

A THREE.

Q AND THOSE WERE WHO?

A PHIL GALVEZ IN SAN DIEGO, KING CHEUNG IN LOS ANGELES, AND ED VOVERIS IN LOS ANGELES.

Q AND WERE THE DUTIES OF THESE SENIOR DEPUTIES DIVIDED UP IN SOME GEOGRAPHICAL BASIS?

A ONLY FROM THE STANDPOINT THAT GALVEZ WAS IN SAN DIEGO.

Q DID MR. GALVEZ HANDLE CASES OUTSIDE OF THE SAN DIEGO AREA?

A HE PROBABLY DID. WE TRIED TO LIMIT IT TO THAT, BUT HE PROBABLY HAD CASES OUTSIDE OF THAT.

Q DID EACH SENIOR DEPUTY HAVE SPECIFIC DEPUTY LABOR COMMISSIONERS ASSIGNED TO THAT PERSON, OR WAS IT DONE BY CASE, OR HOW WAS THAT DONE?

A IT WAS ASSIGNED BY PERSON.

Q SO, FOR EXAMPLE, A PARTICULAR DEPUTY LABOR COMMISSIONER WOULD HAVE ONE SENIOR DEPUTY THAT WOULD BE HIS OR HER SUPERVISOR?

[37] A CORRECT.

Q AND SO ON ANY CASE THAT DEPUTY LABOR COMMISSIONER WAS WORKING ON, IF HE OR SHE WENT FOR SOME APPROVAL TO THE SENIOR DEPUTY, IT WOULD ALWAYS BE THAT PARTICULAR SENIOR DEPUTY?

A WITH SOME EXCEPTIONS IF THAT SENIOR DEPUTY WASN'T AVAILABLE, BUT YES.

Q DO YOU KNOW WHO THE SENIOR DEPUTY FOR JUAN GARZA WAS?

A PHIL GALVEZ.

Q AND DO YOU KNOW FOR WHAT PERIOD OF TIME THAT WAS?

A NO, I DO NOT. WHEN HE WAS INITIALLY HIRED, HE WAS SUPERVISED BY PHIL.

Q AND WAS THAT UP UNTIL ABOUT A YEAR AGO?

A NO, BECAUSE WE HAD MADE SOME OTHER CHANGES IN THE PUBLIC WORKS UNIT.

Q AND WHEN WAS IT THAT YOU MADE THE OTHER CHANGES?

A ABOUT TWO YEARS AGO, TWO AND A HALF YEARS AGO.

Q WHAT WERE THOSE OTHER CHANGES?

A THAT WAS CONSOLIDATING THE PUBLIC WORKS TO BE HANDLED OUT OF LOS ANGELES.

Q WHEN YOU SAY "HANDLED OUT OF LOS ANGELES,"

* * *

[39] APPROVAL OF A NOTICE TO WITHHOLD FROM A SENIOR DEPUTY?

A YES.

Q WHAT WAS THAT PROCEDURE?

A THEY WERE TO BRING EITHER THE CASE FILE OR THE PERTINENT INFORMATION PERTAINING TO THE NOTICE FOR REVIEW OF THE SENIOR DEPUTY.

Q WERE THERE ANY OTHER PROCEDURES?

A IF YOU'RE TALKING PROCEDURES, SOMETIMES BECAUSE OF THE TIME RESTRAINTS AND THE PHYSICAL LOCATION, IT COULD HAVE BEEN DONE BY FAX OR IT COULD HAVE BEEN DONE BY PHONE.

Q WAS THERE ANY PARTICULAR PROCEDURES THAT THE SENIOR DEPUTY WAS TO FOLLOW IN

DETERMINING WHETHER TO APPROVE THE ISSUANCE OF THE NOTICE TO WITHHOLD?

A YOU KNOW, I DON'T KNOW WHETHER YOU WOULD CALL IT PROCEDURES, REVIEWING THE FORMAT OF THE DOCUMENTS TO MAKE SURE THAT ALL THE INFORMATION IS THERE AND TO MAKE SURE THAT THE BASIS FOR THE NOTICE TO WITHHOLD WAS ESTABLISHED.

Q WERE THERE ANY PARTICULAR GUIDELINES THAT WERE TO BE FOLLOWED BY THE SENIOR DEPUTY IN MAKING THIS REVIEW OF THE DOCUMENTS AND THE BASIS OF THE NOTICE TO WITHHOLD?

A NO.

Q WAS THERE ANY PARTICULAR STANDARD THAT WAS [40] TO BE APPLIED BY THE SENIOR DEPUTY IN DETERMINING WHETHER THERE WAS SUFFICIENT BASIS FOR A NOTICE TO WITHHOLD?

A IT WAS HANDLED ON INDIVIDUAL CASES.

Q WHAT DO YOU MEAN BY THAT?

A THAT EACH CASE WAS SEPARATE AS TO WHAT THE FACTS WERE ON THAT PARTICULAR CASE.

Q WERE THERE ANY OTHER PARTICULAR GUIDELINES OR PROCEDURES THAT YOU INSTRUCTED THE SENIOR DEPUTIES THEY WERE TO FOLLOW IN DETERMINING WHETHER TO APPROVE THE ISSUANCE OF A NOTICE TO WITHHOLD?

MR. VILLENEUVE: OBJECTION. ASKED AND ANSWERED.

BY MR. SEIDEMAN:

Q YOU CAN ANSWER THAT. OBJECTIONS ARE FOR THE RECORD, AND MAYBE AT SOME LATER POINT THEY WILL BE RULED ON.

A REPEAT THE QUESTION.

Q OTHER THAN WHAT YOU JUST STATED, WERE THERE ANY OTHER PROCEDURES OR GUIDELINES THAT YOU INSTRUCTED ANY OF THE SENIOR DEPUTIES THEY WERE TO FOLLOW IN CONNECTION WITH THE ISSUANCE OF A NOTICE TO WITHHOLD?

A WELL, THE INSTRUCTIONS WERE TO MAKE SURE THAT THERE IS A BASIS FOR ISSUING A NOTICE TO WITHHOLD.

Q WERE THOSE INSTRUCTIONS THAT YOU GAVE TO THE SENIOR DEPUTIES?

A THEY WOULD HAVE BEEN IN INSTRUCTIONS THAT

* * *

[71] THE WITNESS: MY ANSWER TO YOU IS NO, I DID NOT.

BY MR. SEIDEMAN:

Q WITH REGARD TO THE APPROVAL OF A NOTICE TO WITHHOLD, WHETHER THE ISSUANCE OF A NOTICE TO WITHHOLD WAS APPROVED BY A SENIOR DEPUTY OR BY YOU AS REGIONAL MANAGER, WAS THERE ANY TYPE OF RECORD THAT WAS SUPPOSED TO BE KEPT CONCERNING THE APPROVAL OF THAT NOTICE TO WITHHOLD?

A THERE'S NO APPROVAL. THE FORM ITSELF, AND I'M NOT SURE EXACTLY WHAT PERIOD OF TIME IT STARTED, I INITIAL ON THE TOP AS BEING APPROVED AND PUT A DATE ON IT.

Q SO IF YOU APPROVED A NOTICE TO WITHHOLD, THE ACTUAL NOTICE ITSELF WOULD HAVE YOUR INITIALS AND A DATE ON THE TOP; IS THAT RIGHT?

A I STARTED DOING THAT, YES.

Q DO YOU KNOW WHEN YOU STARTED DOING THAT?

A NO, I DO NOT.

Q DO YOU KNOW APPROXIMATELY WHEN?

A NO, I DO NOT.

Q WAS IT BEFORE OR AFTER YOU BECAME SENIOR DEPUTY?

A I THINK IT WAS AFTER, BUT I DON'T RECALL.

Q DO YOU KNOW WHETHER THERE WAS ANY PROCEDURE FOLLOWED BY OTHER SENIOR DEPUTIES FOR DOCUMENTING APPROVAL OF A NOTICE TO WITHHOLD?

A NO, I DO NOT.

* * *

[149] ONES YOU SHOULD KNOW ABOUT?

A NO, HE DID NOT.

Q WELL, HAVING LOOKED AT WHAT YOU'VE LOOKED AT AND GONE THROUGH THE DISCUSSION

THAT YOU'VE HAD, IS THERE ANYTHING NOW THAT YOU REMEMBER ABOUT G & G AND THE INVESTIGATIONS OF G & G AND SO FORTH THAT YOU DIDN'T REMEMBER BEFORE?

A NOT ANY PARTICULAR ITEM, NO.

Q YOU'RE AWARE THAT THERE ARE NOTICES TO WITHHOLD THAT WERE ISSUED ON SEVERAL PROJECTS REGARDING G & G?

A YES, I AM.

Q APPROXIMATELY HOW MANY OTHER CONTRACTORS ARE THERE IN THE LAST YEAR WHERE YOU'VE BEEN INVOLVED IN APPROVING NOTICES TO WITHHOLD ON SEVERAL PROJECTS?

A SEVERAL HUNDRED.

Q AND WOULD YOU SAY THAT THERE ARE CERTAIN OF THOSE CASES THAT YOU WOULD BE MORE INVOLVED IN AND HAVE A BETTER RECOLLECTION OF THAN OTHERS?

A THERE ARE SOME, YES.

Q BUT APPARENTLY, THE G & G CASE IS NOT ONE OF THOSE?

A NO. I TOLD YOU I DON'T REMEMBER ANY PARTICULAR DISCUSSIONS. I REMEMBER A LOT OF DISCUSSIONS REGARDING G & G, YES.

* * *

[179] Q BUT DON'T YOU HAVE TO MAKE SOME JUDGMENT OF WHETHER THERE'S A VIOLATION OF THE LAW?

A WE'VE ISSUED THE NOTICE TO WITHHOLD BASED UPON THE INVESTIGATION OF THE DEPUTY.

Q DO YOU YOURSELF MAKE ANY INDEPENDENT JUDGMENT ABOUT WHETHER THE NOTICE TO WITHHOLD IS VALID?

A VERY DEFINITELY, YES.

Q AND IN ORDER FOR IT TO BE VALID, DOES THERE HAVE TO BE SOME VIOLATION OF STATE LAW?

A YES.

Q SO DO YOU HAVE TO CONCLUDE BEFORE YOU APPROVE A NOTICE TO WITHHOLD THAT THERE'S BEEN SOME VIOLATION OF STATE LAW?

A THAT'S CORRECT.

Q IS IT YOUR NORMAL PROCEDURE TO MAKE THAT CONCLUSION BASED ON INFORMATION THAT'S BEEN BROUGHT FORWARD BY SOMEONE?

A NO. IT'S BASED UPON THE INVESTIGATION THE DEPUTY CONDUCTED.

Q YOU ONLY LOOK TO WHAT THE DEPUTY SAYS?

A CORRECT.

Q SO IF SOME THIRD PARTY OTHER THAN THE DEPUTY HAD SAID I SAW THIS OR I SAW THAT, YOU DON'T TAKE THAT INTO ACCOUNT AT ALL IN ISSUING A NOTICE TO WITHHOLD?

A THAT'S NOT TRUE. IT'S BASED ON THE

* * *

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EXHIBIT 5

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

G & G FIRE SPRINKLERS, INC., PLAINTIFF, VS. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, A CORPORATION, DEFENDANT.	CASE NO. BC104623 VOLUME II

DEPOSITION OF ROGER D. MILLER

LOS ANGELES, CALIFORNIA

JANUARY 19, 1995

* * *

[233] NOT RECALL RECEIVING THE LETTER. IT'S VERY POSSIBLE I RECEIVED IT, BUT I DON'T RECALL.

Q SO YOU'RE SAYING YOU DON'T KNOW WHETHER IT'S ACCURATE BECAUSE IT MAY BE THAT YOU RECEIVED IT AND YOU DON'T RECALL RECEIVING IT?

A THAT IS CORRECT.

Q AND IF YOU HAD RECEIVED IT, WHAT WOULD YOU HAVE DONE WITH IT IN TERMS OF FILING IT SOMEWHERE?

A I WOULD NOT HAVE FILED IT. IF IT PERTAINS TO THE CASE, IT WOULD HAVE GONE BACK TO HIM BECAUSE IT WOULD HAVE BEEN KEPT ON THAT CASE. I DO NOT KEEP A SEPARATE FILE.

Q IF YOU SENT THAT LETTER OR ANY SUCH LETTER THAT YOU RECEIVED FROM JUAN GARZA BACK TO THE FILE, WOULD YOU HAVE MADE ANY NOTATION THAT YOU HAD REVIEWED IT OR SOMETHING OF THAT SORT THAT ONE COULD LOOK AT THE FILE AND SEE WHETHER THAT DOCUMENT WAS EVER RECEIVED OR REVIEWED BY YOU?

A NO.

Q WHEN YOU RECEIVE DOCUMENTS IN ORDER TO APPROVE A NOTICE TO WITHHOLD, IN OTHER WORDS, WHEN A DEPUTY LABOR COMMISSIONER GIVES YOU DOCUMENTS WITH REGARD TO A NOTICE TO WITHHOLD THAT'S PROPOSED AND IS ASKING FOR YOU TO APPROVE IT, WHAT DO YOU DO WITH THOSE DOCUMENTS AFTER YOU REVIEW THEM?

[234] A SEND THEM BACK.

Q SEND THEM BACK TO THE DEPUTY?

A CORRECT.

Q AND HOW DO YOU DO THAT? IS IT BY MAIL, BY FAX, WHAT METHOD?

A COULD BE ANY METHOD. GENERALLY, IT'S A PHYSICAL THING THAT I LOOK AT IT AND HAND IT BACK TO THEM. THAT'S GENERALLY HOW THEY'RE APPROVED.

Q YOU'RE SAYING THAT THIS WOULD BE A SITUATION WHERE YOU HAD AN IN-PERSON MEETING WITH THE DEPUTY TO DISCUSS THE NOTICE TO WITHHOLD?

A THAT IS THE GENERAL PROCEDURE, YES.

Q WHAT ABOUT THOSE SITUATIONS WHERE YOU APPROVE THE NOTICE TO WITHHOLD OVER THE TELEPHONE?

A THEN I INSTRUCT THEM TO NOTE THAT IN THE FILE AND NOTE THAT ON THE NOTICE TO WITHHOLD THAT IT HAS BEEN APPROVED.

Q HOW IS THAT SUPPOSED TO BE NOTED ON THE NOTICE TO WITHHOLD?

A THERE IS NO PROCEDURE SET UP FOR THEM TO DO THAT.

Q YOU JUST SAY, "NOTE IT SOMEHOW"?

A THAT'S CORRECT.

Q DO YOU EVER CHECK TO SEE IF THEY'VE DONE THAT?

* * *

[238] THE FILES HAVE TO BE KEPT UP TO DATE, THAT INFORMATION THAT IS RECEIVED, DISCUSSIONS THAT ARE MADE, ARE SUPPOSED TO BE NOTED IN THE FILES.

Q WHAT DID JUAN GARZA SAY TO YOU ABOUT THAT SUBJECT?

A I'M SURE THAT HE WOULD HAVE SAID THAT HE WILL TRY TO DO IT.

Q SO YOU DON'T ACTUALLY REMEMBER HIM SAYING THAT; IS THAT RIGHT?

A THAT'S CORRECT.

Q DO YOU ACTUALLY REMEMBER ANYTHING HE SAID ON THAT SUBJECT?

A NO, I DO NOT.

Q IS IT THE POLICY THAT WHEN ISSUING A NOTICE TO WITHHOLD, THE MAXIMUM AMOUNT OF PENALTY WILL BE ASSESSED?

A THAT WAS THE POLICY, YES.

Q ARE YOU SAYING THAT'S NO LONGER THE POLICY?

A YES.

Q WHEN DID THE POLICY CHANGE?

A I CAN'T GIVE YOU A DATE. I DON'T RECALL.

Q CAN YOU GIVE AN APPROXIMATE DATE?

A APPROXIMATELY FOUR OR FIVE MONTHS AGO.

Q AND WHO CHANGED THAT POLICY?

[239] A I RECEIVED INSTRUCTIONS FROM SIMON REYES.

Q WERE THE INSTRUCTIONS IN WRITING OR ORAL?

A THEY WERE ORAL.

Q THEY WERE ORAL INSTRUCTIONS?

A YES.

Q AND WHAT WERE THE INSTRUCTIONS THAT SIMON REYES GAVE YOU WITH REGARD TO ASSESSMENT OF PENALTIES?

A TO REVIEW THE ASSESSMENTS PRIOR TO THEM BEING ASSESSED.

Q WERE THERE ANY OTHER INSTRUCTIONS THAT SIMON REYES GAVE YOU FOUR OR FIVE MONTHS AGO IN CONNECTION WITH CHANGING THE POLICY WITH REGARD TO ASSESSING PENALTIES?

A NOT THAT I RECALL, NO.

Q SO ALL SIMON REYES SAID TO YOU WAS, "REVIEW THE ASSESSMENTS BEFORE THEY'RE ASSESSED"?

A I DID NOT SAY THAT.

Q WHAT WAS IT THAT SIMON REYES TOLD YOU FOUR OR FIVE MONTHS AGO ABOUT THE POLICY REGARDING PENALTY ASSESSMENTS?

A I THINK I MENTIONED THAT WHEN YOU ASKED THE QUESTION. I TOLD YOU I DON'T RECALL WHAT THE OTHER DISCUSSION WAS. HE WOULD HAVE DISCUSSED THAT WITH I AND THE OTHER SUPERVISOR UP NORTH AS TO WHAT WE NEED TO BE [240] DOING.

Q WHAT WAS YOUR UNDERSTANDING OF HOW THE POLICY WAS BEING CHANGED?

A THAT THE DEPUTY WOULD GET APPROVAL FROM THE SUPERVISOR PRIOR TO ASSESSING THE PENALTIES.

Q PRIOR TO THIS DISCUSSION WITH SIMON REYES FOUR OR FIVE MONTHS AGO, COULD A DEPUTY ASSESS PENALTIES WITHOUT GETTING APPROVAL OF A SUPERVISOR?

A THE DEPUTY WAS INSTRUCTED TO ASSESS THE FULL PENALTIES, YES.

Q AND SO THAT THE NEW PROCEDURE THAT WAS GIVEN TO YOU FROM SIMON REYES FOUR OR FIVE MONTHS AGO WAS THAT THE DEPUTY WAS TO GET APPROVAL FOR THE PENALTIES FROM THE SUPERVISOR; IS THAT RIGHT?

A THAT'S CORRECT.

Q WAS THERE ANY INSTRUCTION GIVEN ABOUT HOW TO GO ABOUT DETERMINING WHAT THOSE PENALTIES SHOULD BE?

A YES.

Q AND WAS THAT INSTRUCTION GIVEN TO YOU BY SIMON REYES?

A YES.

Q AND WAS THIS ORAL OR IN WRITING?

A AS FAR AS I REMEMBER, IT WAS ORAL.

Q WHAT WERE THE INSTRUCTIONS THAT YOU GOT FOUR OR FIVE MONTHS AGO FROM SIMON REYES ABOUT HOW TO

* * *

[266] A THAT'S THE FORM THAT WE WERE TOLD TO USE, SO WE WERE USING IT.

Q WELL, IS ONE OF THE REASONS THAT THAT LANGUAGE IS PUT IN THERE IS THAT ONE WAY TO GET – TO TRY TO GET INFORMATION TO SUPPORT A NOTICE TO WITHHOLD IS TO TELL EMPLOYEES THAT IF THEY SUPPORT YOUR POSITION, THEY'LL GET THE MONEY?

A NO, IT'S NOT.

Q HAVE YOU HAD THAT SITUATION ARISE, CASES WHERE EMPLOYEES WERE MAKING FALSE CLAIMS TO TRY TO GET MONEY?

A I'M SURE WE HAVE, YES.

I NEED MY COPIES BACK, THAT'S ALL. I DON'T WANT YOU TO BURY THEM UNDER THERE. IT WASN'T INTENDED TO INTRODUCE THAT SO THAT –

Q DO YOU HAVE ANY PROCEDURES IN EFFECT TO TRY TO ASSURE THAT THE DEPUTIES DON'T ATTEMPT TO MAKE A CASE BY ACCUMULATING EVIDENCE THAT PEOPLE PROVIDE IN ORDER TO TRY TO IMPROPERLY GET SOME MONEY OR OTHER FINANCIAL BENEFIT?

A WELL, ONE OF THE PROCEDURES IS THAT THE NOTICE TO WITHHOLD IS REVIEWED PRIOR TO IT BEING ISSUED.

Q IT'S REVIEWED BY YOU?

A THAT'S CORRECT.

Q IT'S NOT REVIEWED BY ANYBODY ELSE?

[267] A NO, IT IS NOT.

Q I'M GOING TO SHOW YOU SOME DOCUMENTS. THESE WERE MARKED AS PART OF AN EXHIBIT TO THE DEPOSITION OF JUAN GARZA, AND THESE PARTICULAR DOCUMENTS WERE IN EXHIBIT 2 OF THAT DEPOSITION THAT HAD PAGE NUMBERS 253 THROUGH 260, AND THEY ARE SOME KIND OF COMPUTER PRINTOUTS. THE FIRST PAGE SAYS "EMPLOYER INQUIRY" AT THE TOP. LET ME SHOW THESE TO YOU, AND WHAT I'D LIKE TO KNOW IS HAVE YOU EVER SEEN THIS TYPE OF DOCUMENT BEFORE?

A YES.

Q DO YOU KNOW WHERE THESE DOCUMENTS COME FROM?

A I BELIEVE THEY COME FROM THE EMPLOYMENT DEVELOPMENT DEPARTMENT.

Q HAVE YOU EVER SEEN THESE SPECIFIC DOCUMENTS BEFORE?

A I DO NOT RECALL THESE, NO.

Q ARE DOCUMENTS OF THIS TYPE, THAT IS, THESE PAGES 253, ET CETERA, TO EXHIBIT 2 OF THE JUAN GARZA DEPOSITION, ARE THESE DOCUMENTS THAT WOULD TYPICALLY BE OBTAINED BY DLSE IN CONNECTION WITH INVESTIGATION OF A PREVAILING WAGE MATTER?

A I DON'T KNOW WHAT YOU MEAN "TYPICALLY." IF WE THINK THAT THERE IS A PROBLEM, YES, WE WOULD OBTAIN THE INFORMATION.

* * *

[301] HAVE NOT.

Q THE LETTER STATES THAT THE UNIVERSITY IS GOING TO WITHHOLD $65,875.38 BECAUSE IT RECEIVED A STOP NOTICE FROM THE LABOR COMMISSIONER. LET ME JUST ASK YOU, LOOKING AT THE LETTER, DOES THIS REFRESH YOUR RECOLLECTION TO ANYTHING RELATING TO THE MOORE HALL PROJECT OR G & G?

A NO, IT DOES NOT.

Q IS IT CORRECT THAT WHEN A NOTICE TO WITHHOLD IS ISSUED TO AN AWARDING BODY, THAT THE AWARDING BODY IS REQUIRED TO WITHHOLD THE MONEY AS STATED IN THE NOTICE TO WITHHOLD?

A THAT'S CORRECT.

Q LET ME SHOW YOU PAGES 1503 TO 1534 OF EXHIBIT 25, AND TO TRY TO ASSIST, LET ME EXPLAIN. WHAT THESE APPEAR TO BE IS DOCUMENTS FORWARDED BY ACCI WITH SOME KIND OF ANALYSIS OF HOURS OF SOME KIND AND VARIOUS BACKUP DOCUMENTS, INCLUDING THE CHANGE ORDER TYPE DOCUMENTS AND THINGS. NOW, HAVE YOU EVER SEEN THESE DOCUMENTS BEFORE?

A I DON'T RECALL SEEING THESE DOCUMENTS, NO.

Q SO IS IT YOUR BELIEF YOU HAVE NOT SEEN THEM BEFORE?

A IT'S MY BELIEF I HAVEN'T SEEN THEM. I DON'T RECALL SEEING THEM.

Q WHAT I'D LIKE YOU TO DO IS LOOK AT THE

* * *

EXHIBIT 6

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

G & G FIRE SPRINKLERS, INC., PLAINTIFF, VS. ANAHEIM REDEVELOPMENT AGENCY, ET AL., DEFENDANTS.	)	NO. 71 62 15

VOLUME I

DEPOSITION OF JUAN GARZA

LOS ANGELES, CALIFORNIA

JUNE 7, 1994

* * *

[63] TALKING ABOUT DISCUSSIONS THAT WOULD TAKE PLACE ON A PARTICULAR CASE; IS THAT RIGHT?

A UH-HUH.

Q IS THAT YES?

A YES.

Q YOU HAVE TO SAY "YES."

A I UNDERSTAND. I KNOW THAT. I REALIZE THAT.

Q WAS THERE EVER ANY TIME THAT YOU WERE GIVEN ANY SORT OF GENERIC INSTRUCTION LIKE "HERE IS HOW YOU GO ABOUT DOING AN INVESTIGATION"?

A GENERALLY SPEAKING, YES. IN A GENERAL SENSE, YES. BUT THE DEPUTY HAS ALWAYS BEEN RESPONSIBLE FOR DETERMINING WHAT IS NEEDED IN A CASE TO ESTABLISH THE BASIS FOR ANY ACTION. AND THEN HE WOULD – IN THE CASE OF PUBLIC WORKS, I WOULD GO TO ROGER FOR EACH NOTICE TO WITHHOLD THAT I WOULD ISSUE, THEN TELL HIM, "THIS IS THE BASIS, THIS IS WHAT I HAVE DONE, THIS IS THE EVIDENCE IN THE FILE."

Q BEFORE YOU WOULD UNDERTAKE ONE OF THESE SO-CALLED SELECTIVE INVESTIGATIONS, WOULD YOU GO TO ROGER MILLER AND SAY, "THIS IS WHAT I THINK I OUGHT TO DO" AND GET HIS APPROVAL?

A I THINK I WOULD PROBABLY – THE ANSWER TO THAT WOULD BE YES, BUT IT WOULD BE COUPLED

* * *

EXHIBIT 7

[Names Omitted In Printing]

LEVIN, STEIN, CHYTEN & SCHNEIDER

ATTORNEYS AT LAW
SUIT 1450
12424 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90025
TELEPHONE (310) 207-4663
FAX (310) 207-2803

August 24, 1995

VIA FACSIMILE & FIRST CLASS MAIL

Michael S. Villeneuve, Esq.
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
245 West Broadway, Suite 450
Long Beach, CA 90802-4445

Re: *G & G Fire Sprinklers, Inc./CAL-PAC Construction, Inc./California State University, San Bernardino*

Dear Mr. Villeneuve:

I am writing with regard to a notice of penalty assessment which was issued with regard to the project known as Health, P. E. Classroom, Office Facilities, SB-264 R, California State University, San Bernardino. I have enclosed herewith a copy of the notice of penalty assessment.

I have been informed that the Deputy Labor Commissioner, Rosa Frazier, has stated that the notice of penalty assessment was issued because of non-response to a letter mailed to G & G Fire Sprinklers, Inc. ("G&G"), requesting

copies of certified payroll records. The letter was never received by G&G. According to Ms. Frazier, the letter was sent to a previous address of G&G, where G&G no longer resides.

The prime contractor, CAL-PAC Construction, Inc. ("CAL-PAC") has stated that they never received any request for certified payrolls from Ms. Frazier. According to CAL-PAC, Ms. Frazier stated that she sent the letter to CAL-PAC at an incorrect address, and the letter was returned to Ms. Frazier undelivered.

The penalty assessment is vague as to the amount which shall be withheld thereunder. The penalty assessment states that "The amount due as of 7-11-95, is $8,250.00. The withholding shall continue until you are notified to the contrary by this office." I am informed that the University interprets the notice of penalty assessment to be indefinite in amount, with penalties continuing to accrue on a daily basis. As a result, G&G's final payment for work at the project was not made. Additionally, CAL-PAC has stated that the University is withholding a large amount of its money.

Upon receipt of the notice of penalty assessment, G&G promptly provided copies of certified payrolls to Ms. Frazier. However, Ms. Frazier has been unwilling to rescind the notice of penalty assessment, and unwilling to specify the specific amount to be withheld under the penalty assessment. As a result, it is my understanding that the University is withholding all payment on the project.

I request that the notice of penalty assessment be rescinded immediately. In the event that DLSE is unwilling to rescind the notice of penalty assessment, I request that a specific amount thereof be specified. I also request that you provide me with the following documents and information:

1. A copy of the letter requesting copies of payrolls from G&G.

2. A copy of all documents indicating the addresses to which the aforesaid letter was mailed (whether to G&G or to CAL-PAC).

3. A copy of all documents indicating whether or not the aforesaid letter was received by either CAL-PAC or G&G.

4. An explanation of how the penalty amount of $750.00 per day was determined.

5. A description of all efforts which were made to obtain the payroll records prior to the issuance of the notice of penalty assessment.

The aforesaid information and documents regarding the notice of penalty assessment are needed to determine, among other things, whether the penalty assessment resulted from alleged acts or omissions of CAL-PAC, or of G&G; and thus, whether CAL-PAC is entitled to withhold money from G&G.

Your prompt attention to this matter will be appreciated.

Very truly yours,

LEVIN, STEIN, CHYTEN
& SCHNEIDER

/s/ Stephen A. Seideman
Stephen A. Seideman

SAS/jvs
encl.

LABOR COMMISSIONER, STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT
Bureau of Field Enforcement
145 W. Broadway, Room 450
Long Beach, CA 90802 (310) 499-5303

[SEAL]

CAL. STATE UNIVERSITY, San Bernardino
5500 University Pkwy., #127
San Bernardino, CA 92407

July 11, 1995 In reply, Refer to Claim No: 40-PW-00363/593

NOTICE OF PENALTY ASSESSMENT

[Illegible] Contract No.	Contract No. 1264/Health, P.E., Classroom, Office Facilities SB-264R, California State University, San Bernardino
[Illegible] Contractor	CAL-PAC CONSTRUCTION, INC.
Contractor	G & G FIRE SPRINKLERS, INC.

We have been unable to obtain certified copies of payroll records concerning the above-named project.

Pursuant to Section 1778(f) of the Labor Code, you are hereby directed to withhold $750.00, per calendar day, commencing July 1, 1995, from any and all progress payments which are now or hereafter may become due to the contractor(s) hereinafter named. The amount due as of 7-11-95, is $8,250.00.

The withholding shall continue until you are notified to the contrary by this office.

You are hereby required, pursuant to said section to withhold any and all payments which are now or hereafter may become due to the contractor herein above named to the extent of the claim as herein above shown.

I declare under perjury as follows: I am an authorized representative acting for the State Labor Commissioner. I declare that I have read the foregoing Notice of Penalty Assessment and I have made an Investigation of the facts relating thereto, and based on all the facts known to me at this time and based on all of the statements and information given to me at this time. I am informed and believe that the foregoing Notice of Penalty Assessment is true and correct and that the facts have been found to support this Notice.

Executed on July 11, 1995, at Long Beach, California.

STATE LABOR COMMISSIONER

By /s/ Rosa Frazier
Rosa Frazier, Deputy Labor Commissioner

cc: Bonding Company
✓ Prime Contractor
Subcontractor

Transmission-Report

Time: Aug 24 '95 16:22

Tel Number: 3102072803

Name: L S C & S Attorneys

NBR:	926
Date:	August 24
Time:	16:19
Duration:	03/11
PGS:	04
To:	(310) 499-6367
Dept. Code	
Mode:	G3
Status:	OK

EXHIBIT 8

ARTER & HADDEN

ATTORNEYS AT LAW

founded 1843

Jamboree Center
Two Park Plaza/Suite 700
Irvine, California 92714
714/252-7500 *phone*
714/833-9604 *facsimile*

[Other Offices Omitted In Printing]

August 28, 1995

VIA FACSIMILE

Michael S. Villeneuve
Division of Labor Standards Enforcement
Department of Industrial Relations
State of California
245 W. Broadway, Suite 450
Long Beach, California 90802-4445

Re: *Notice of Withhold; G&G FireSprinklers, Inc.*

Dear Michael:

Enclosed please find a letter from the California State University to Cal-Pac Construction, Inc. dated August 22, 1995. As this letter indicates, the University is refusing to honor Cal-Pac's payment application because of an open ended order to withhold funds issued by the Labor Commissioner. This Notice of Withhold was issued by your office on July 12, 1994 and instructed the University to withhold the sum of $750.00 per day until further notice. As you know, this Notice of Withhold relates to a request made by the Labor Commissioner for the certified payroll

records of G&G FireSprinklers, Inc. It is our understanding that this request was sent to the wrong address, and that after the proper notice was given, all appropriate documents have been provided.

As this letter indicates, the University is not prepared to release any portion of the $501,000 in Cal-Pac's funds it is holding until the University receives notification from your office of the resolution of this Notice of Withhold. If this situation continues to persist, we can expect that many of Cal-Pac's subcontractors, who will not be paid, will serve stop notices or commence litigation. As a result, the damages which Cal-Pac may incur will be substantial. Accordingly, I request that you contact me immediately to discuss how this issue can be promptly resolved.

Thank you for your attention to the above, and I look forward to hearing from you soon.

Very truly yours,

ARTER & HADDEN

/s/ Jack W. Fleming
Jack W. Fleming

JWF:sm
Encl.

cc: Cal-Pac Construction, Inc. (w/encl.)
Richard Ceccia, Esq. (w/encl.)

THE CALIFORNIA STATE UNIVERSITY

(Cities Omitted In Printing)

THE CHANCELLOR – SWRL LOCATION
(310)[illegible] TELEFAX: (310)[illegible]

August 22, 1995

[Illegible] Joe Wyhowanec
Cal-Apc Construction, Inc.
[illegible] Bristol Parkway, Suite 106
Culver City, CA 90230

Dear Mr. Wyhowanec:

Stop Notice – Steelform Contracting Company
Stop Notice Summary
SB-264(R), Health/P.E. Building
California State University, San Bernardino

[Illegible] are in receipt of your Payment Request No. 31 (which should be No. 30) signed by [Illegible] Heller. This request cannot be honored because of the open-ended Labor Commissioner order to withhold $750.00 per day until their complaint has been satisfied. This withhold now is about $40,000.00 and increasing daily.

[Illegible], the next payment request must accurately account for the stop notices that still [illegible]. Our records show this to be about $397,000.00 as of today. however, this [illegible] may have to be increased due to recent correspondence from Attorney Laurel S. [Illegible], representing Steel Form, claiming a stop notice in the amount of $83,191.98 (out [illegible] must be $103,989.98). This stop notice, addressed to Michael Clevenger, apparently got lost in our office, as it was signed for on August

1, 1994 by our receptionist. Therefore, the amount currently held should be about $501,000.00, unless [illegible] have a satisfactory resolution of any of the remaining items.

Enclosed is a copy of a stop notice dated July 27, 1994 from Steelform Contracting company in the amount of $83,191.98 filed against the subject project.

[Illegible] with Section 3186 of the California Civil Code, we will honor the stop [illegible] insofar as monies exist which are otherwise due and payable to your firm. [Illegible] to the availability of these funds, we will hold in retention 125% of the amount [illegible] stop notice ($103,989.98). Please review these matters, as well as outstanding [illegible] in my letter dated August 9, 1995, with Tony Espinosa.

[Illegible] you know, G. E. Supply is subpoenaing all records relating to this project and [illegible] mencing suit against the bond. Your assistance toward early resolution of [illegible] standing matters will be appreciated.

Sincerely,

[Illegible] E. Ownen, P.E.
[Illegible] Engineer
[Illegible] Planning and Development

[Illegible]

Enclosures: Copy of Attorney Laurel S. Stanley's letter of 8-15-95
Copy of Stop Notice
Copy of Stop Notice Receipt

Mr. David DeMauro
Mr. Bill Shum
Mr. Tony Simpson
Mr. Clifford Hahn
Ms. Stephanie Giordano
Mr. Herbert Zuidema

EXHIBIT 9

LABOR CODE

EXCERPTS FROM THE CALIFORNIA LABOR CODE, DIVISION 2

PART 7. PUBLIC WORKS AND PUBLIC AGENCIES

CHAPTER 1. Public Works

Article 1. Scope and Operation

1720. As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

(Amended by Stats. 1989, Ch. 278. Effective August 7, 1989.)

1720.2. For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons.

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work, more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use.

(c) Either of the following conditions exists:

(1) The lease agreement between the lessor and the state or political subdivision, as lessee, was entered into prior to the construction contract.

(2) The construction work is performed according to plans, specifications, or criteria furnished by the state or political subdivision, and the lease agreement between

the lessor and the state or political subdivision, as lessee, is entered into during, or upon completion of, the construction work.

(Amended by Stats. 1980, Ch. 962.)

1720.3. For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency, including the California State University and the University of California.

(Amended by Stats. 1983, Chs. 142, 143.)

1720.4. For the limited purposes of this chapter, "public works" shall not include any otherwise covered work which meets all the following conditions:

(a) The work is performed entirely by volunteer labor.

(b) The work involves facilities or structures which are, or will be, used exclusively by, or primarily for or on behalf of, private nonprofit community organizations including, but not limited to, charitable, youth, service, veterans, and sports groups or associations.

(c) The work will not have an adverse impact on employment.

(d) The work is approved by the Director of Industrial Relations as meeting the requirements of this section.

For purposes of subdivision (c), the director shall request information on whether or not the work will have an adverse impact on employment from the appropriate

local or state organization of duly authorized employee representatives of workers employed on public works.

(Added by Stats. 1989, Ch. 1224.)

1721. "Political subdivision" includes any county, city, district, public housing authority, or public agency of the State, and assessment or improvement districts.

(Amended by Stats. 1985, Ch. 239.)

1722. "Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

(Added by Stats. 1937, Ch. 90)

1722.1. For the purposes of this chapter, "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).

(Amended by Stats. 1982, Ch. 454.)

1723. "Workman" includes laborer, workman, or mechanic.

1724. "Locality in which public work is performed" means the county in which the public work is done in cases in which the contract is awarded by the State, and means the limits of the political subdivision on whose behalf the contract is awarded in other cases.

1725. "Alien" means any person who is not a born or fully naturalized citizen of the United States.

1726. The body awarding the contract for public work shall take cognizance of violations of the provisions of this chapter committed in the course of the execution of the contract.

(Added by Stats. 1937, Ch. 90)

1727. Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

(Amended by Stats. 1992, Ch. 1342.)

1728. In cases of contracts with assessment or improvement districts where full payment is made in the form of a single warrant, or other evidence of full payment, after completion and acceptance of the work, the awarding body shall accept from the contractor in cash a sum equal to, and in lieu of, any amount required to be withheld, retained, or forfeited under the provisions of this section, and said awarding body shall then release the final warrant or payment in full.

1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may

recover from him the amount of the penalty or forfeiture in a suit at law.

(Added by Stats. 1937, Ch. 90)

1730. Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

(Repealed and added by Stats. 1992, Ch. 1342.)

1731. If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the Labor Commissioner for disbursement pursuant to Section 1775 if the contractor does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

1732. Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties is limited to the 90-day period and suit on the contract for alleged breach

thereof in not making the payment is the exclusive remedy of the contractor or his or her assignees with reference to those wages or penalties.

1733. Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

(Amended by Stats. 1992, Ch. 1342.)

1734. Any court collecting any fines or penalties under the criminal provisions of this chapter or any of the labor laws pertaining to public works shall as soon as practicable after the receipt thereof deposit same with the county treasurer of the county in which such court is situated. Amounts so deposited shall be paid at least once a month by warrant of the county auditor drawn upon

requisition of the judge or clerk of said court, to the State Treasurer for deposit in the General Fund.

(Amended by Stats. 1953, Ch. 523.)

1735. No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such persons, except as provided for in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for a violation of this chapter.

(Amended by Stats. 1980, Ch. 992.)

1740. Notwithstanding any other provision of this chapter or any other law of this State, except limitations imposed by the Constitution, the legislative body of a political subdivision which has received or is to receive a loan or grant of funds from the Federal Government or a federal department or agency for public works of that political subdivision, may provide in its call for bids in connection with such public works that all bid specifications and contracts and other procedures in connection with bids or contracts shall be subject to modification to comply with revisions in federal minimum wage schedules without necessity of republication or duplication of other formal statutory requirements.

(Added by Stats. 1957, Ch. 1992)

Article 1.5. Right of Action

1750. (a)(1) The second lowest bidder, and any person, firm, association, trust, partnership, labor organization, corporation, or other legal entity which has, prior to the letting of the bids on the public works project in question, entered into a contract with the second lowest bidder, that suffers damage as a proximate result of a competitive bid for a public works project, as defined in subdivision (b), not being accepted due to the successful bidder's violation, as evidenced by the conviction of the successful bidder therefor, of any provision of Division 4 (commencing with Section 3200) or of the Unemployment Insurance code, may bring an action for damages in the appropriate state court against the violating person or legal entity.

(2) There shall be a rebuttable presumption that a successful bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of this code or of the Unemployment Insurance Code, or of both, was awarded the bid because that successful bidder was able to lower the bid due to this violation or these violations occurring on the contract for public work awarded by the public agency.

(b) For purposes of this article:

(1) "Public works project" means the construction, repair, remodeling, alternation, conversion, modernization, improvement, rehabilitation, replacement, or renovation of a public building or structure.

(2) "Second lowest bidder means the second lowest qualified bidder deemed responsive by the public agency awarding the contract for public work.

(3) The "second lowest bidder" and the "successful bidder" may include any person, firm, association, corporation, or other legal entity.

(c) In an action brought pursuant to this section, the court may award costs and reasonable attorney's fees, in an amount to be determined in the court's discretion, to the prevailing party.

(d) For the purpose of an action brought pursuant to this section, employee status shall be determined pursuant to Division 4 (commencing with Section 3200) with respect to alleged violations of that division, pursuant to the Unemployment Insurance Code with respect to alleged violations of that code, and pursuant to Section 2750.5 with respect to alleged violations of either Division 4 (commencing with Section 3200) or of the Unemployment Insurance Code.

(e) The right of action established pursuant to this article shall not be construed to diminish rights of action established pursuant to Section 19102 of, Article 1.8 (commencing with Section 20104.70) of Chapter 1 of Part 3 of Division 2 of, the Public Contract Code.

(f) A second lowest bidder who has been convicted of a violation of any provision of Division 4 (commencing with Section 3200) of the Labor Code or of the Unemployment Insurance Code, or both, within one year prior to filing the bid for public work, and who has failed to take

affirmative steps to correct that violation or those violations, is prohibited from taking any action authorized by this section.

(Added by Stats. 1991 Ch. 906)

Article 2. Wages

1770. The director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4. Nothing in this article, however, shall prohibit the payment of more than the general prevailing rate of wages to any workman employed on public work. Nothing in this act shall permit any overtime work in violation of Article 3 of this chapter.

(Amended by Stats. 1976, Ch. 281.)

1771. Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

(Amended by Stats. 1981, Ch. 449.)

1771.5. (a) Notwithstanding Section 1771, an awarding body shall not require the payment of the general prevailing rate of per diem wages or the general prevailing rate of per diem wages for holiday and overtime work for any public works project of twenty-five thousand dollars ($25,000) or less when the project is for construction work, or for any public works project of fifteen thousand dollars ($15,000) or less when the project is for alteration, demolition, repair, or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program pursuant to subdivision (b) for every public works project under the authority of the awarding body.

(b) For the purposes of this section, a labor compliance program shall include, but not be limited to, the following requirements:

(1) All bid invitations and public works contracts shall contain appropriate language concerning the requirements of this chapter.

(2) A prejob conference shall be conducted with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract.

(3) Project contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.

(4) The awarding body shall review, and, if appropriate, audit payroll records to verify compliance with this chapter.

(5) The awarding body shall withhold contract payments when payroll records are delinquent or inadequate.

(6) The awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

(Added by Stats. 1989, Ch. 1224.)

1771.6. Notwithstanding Sections 1730, 1731, and 1734, any political subdivision which enforces this chapter in accordance with Section 1771.5 shall, at the expiration of 90 days after the completion of the contract and the formal acceptance of the job, deposit all penalties or forfeitures withheld from any contract payment in the general fund of the political subdivision. Any court collecting any fines or penalties under the criminal provisions of this chapter, or any of the labor laws pertaining to public works, when the fines and penalties resulted from enforcement actions by a political subdivision pursuant to Section 1771.5, shall deposit the fines or penalties in the general fund of the political subdivision.

(Added by Stats. 1989, Ch. 1224.)

1771.7. A contractor may appeal an enforcement action by a political subdivision pursuant to Section 1771.5 to the Director of Industrial Relations. Any ruling by the director shall be final and, notwithstanding Section 1732, any appeal shall waive that contractor's right to bring court action on the same issue.

(Added by Stats. 1989, Ch. 1224.)

1772. Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

(Amended by Stats. 1992, Ch. 1342.)

1773. The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work

shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

(Amended by Stats. 1976, Ch. 281.)

1773.1 Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in Section 1773.8, apprenticeship or other training programs authorized by Section 3093, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.

For the purpose of determining such per diem wages for contracts entered into with the state, the representative of any craft, classification or type of workman needed to execute the contracts entered into with the state shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter may be taken into consideration pursuant to Section 1773 whenever filed 30 days prior to the call for bids.

(Amended by Stats. 1976, Ch. 281.)

1773.2. The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bid specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to the posted at each job site.

(Amended by Stats. 1992, Ch. 1342.)

1773.3 An awarding agency whose public works contract fails within the jurisdiction of Section 1777.5 shall, within five days of the award, send a copy of the award to the Division of Apprenticeship Standards. When specifically requested by a local joint apprenticeship committee, the division shall notify the local joint apprenticeship committee regarding all such awards applicable to the joint apprenticeship committee making the request. Within five days of a finding of any discrepancy regarding the ratio of apprentices to journeymen, pursuant to the certificated fixed number of apprentices to journeymen, the awarding agency shall notify the Division of Apprenticeship Standards.

(Added by renumbering Section 3098 by Stats. 1978, Ch. 1249.)

1773.4. Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after the commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications, or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the

general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

(Amended by Stats. 1969, Ch. 301.)

1773.5. The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

(Amended by Stats. 1989, Ch. 1224.)

1773.6. If during any quarterly period the Director of Industrial Relations shall determine that there has been a change in any prevailing rate of per diem wages in any locality he shall make such change available to the awarding body and his determination shall be final. Such determination by the Director of Industrial Relations shall not be effective as to any contract for which the notice to bidders has been published.

(Amended by Stats. 1976, Ch. 261.)

1773.7. The provisions of Section 11250 of the Government Code shall not be applicable to Section 1773, 1773.4 and 1773.6.

(Repealed and added by Stats. 1976, Ch. 281.)

1773.8. The body awarding any contract for public work shall include in the specifications for the contract a requirement requiring the payment of travel and subsistence payments to each workman needed to execute the work, as such travel and subsistence payments are defined in the applicable collective bargaining agreements filed in accordance with this section.

To establish such travel and subsistence payments for contracts entered into with the state, each city, county and city and county, the representative of any craft, classification or type of workman needed to execute the contracts shall file with the Department of Industrial Relations fully executed copies of collective bargaining agreements for the particular craft, classification or type of work involved. Such agreements shall be filed within 10 days after their execution and thereafter shall establish such travel and subsistence payments whenever filed 30 days prior to the call for bids.

(Added by Stats. 1968, Ch. 880.)

1774. The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

(Added by Stats. 1937, Ch. 90.)

1775. The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is

employed for any public work done under the contract by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later

than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 90 days after the acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both to pay each worker in full, the money shall be prorated among all workers.

(Amended by Stats. 1992, Ch. 1342.)

1776. (a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the

employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either the body awarding the contract, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public shall not be given access to the records at the principal office of the contractor.

(c) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division.

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

(e) Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement shall be marked or obliterated in a manner so as to prevent disclosure of an individual's name, address, and social security number. The name and address of the contractor awarded the contract or performing the contract shall not be marked or obliterated.

(f) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

(i) The director shall adopt rules consistent with the California Public Records Act, (Ch. 3.5 (commencing with Sec. 6250), Div. 7, Title 1, Gov. C.) and the Information Practices Act of 1977, (Title 1.8 (commencing with Sec. 1798) Pt. 4, Div. 3, Civ. C.) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

(Amended by Stats. 1992, Ch. 1342.)

1777. Any officer, agent, or representative of the State or of any political subdivision who willfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of Section 1776 is guilty of a misdemeanor.

(Added by Stats. 1937, Ch. 90.)

1777.1 (a) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period of not less than one year or more than three years. The period of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(b) Whenever any contractor or subcontractor performing a public works project pursuant to this chapter is

found by the Labor Commissioner to be in willful violation of this chapter, except Section 1777.5, the contractor or subcontractor or any firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest shall be ineligible to bid on or to receive any public works contract for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter. These periods of debarment shall run from the date the determination of the violation is made by the Labor Commissioner.

(c) Any determination by the Labor Commissioner shall be made after a full investigation by the Labor Commissioner and a fair and impartial hearing and reasonable notice.

(d) A willful violation occurs when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.

(e) The Labor Commissioner shall promulgate rules and regulations for the administration and enforcement of this section, the definition of terms, and appropriate penalties.

(Added by Stats. 1989, Ch. 1224.)

1777.5 Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be

employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent or approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract,

the number of apprentices to be employed, and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman. However, the minimum ratio for the land surveyor classification shall not be less than one apprentice for each five journeymen.

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprenticeship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymen so employed, except for the land surveyor classification. The contractor shall employ apprentices for the number of hours computed as above before the end of the contact. However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or

trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000) or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

"Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations

prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

(b) The number of apprentices in training in such area exceeds a ratio of 1 to 5.

(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any

of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to Section 3081.

(Amended by Stats. 1989, Ch. 1224.)

1777.6. It shall be unlawful for an employer or a labor union to refuse to accept otherwise qualified employees as registered apprentices on any public works, on the ground of the race, religious creed, color, national

origin, ancestry, sex, or age, except as provided in Section 3077, of such employee.

(Amended by Stats. 1976, Ch. 1179. Effective September 22, 1976.)

1777.7. (a) In the event a contractor or subcontractor willfully fails to comply with Section 1777.5, the Director of Industrial Relations shall deny to the contractor or subcontractor, both individually and in the name of the business entity under which the contractor or subcontractor is doing business, the right to bid on, or to receive, any public works contract for a period of up to one year for the first violation and for a period of up to three years for the second and subsequent violations. Each period of debarment shall run from the date the determination of noncompliance by the Administrator of Apprenticeship becomes an order of the California Apprenticeship Council.

(b) A contractor or subcontractor who violates Section 1777.5 shall forfeit as a civil penalty the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

(c) In lieu of the penalty provided for in subdivision (a) or (b), the director may for a first time violation and with the concurrence of the joint apprenticeship committee, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that

would have been provided for apprentices during the period of noncompliance.

(d) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if the awarding body is an entity other than the state.

(e) The interpretation and enforcement of Section 1777.5 and this section shall be in accordance with the rules and procedures of the California Apprenticeship Council.

(Repealed and added by Stats. 1989, Ch. 1224.)

1778. Every person, who individually or as a representative of an awarding body or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives, or conspires with another to take or receive, for his own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony.

(Added by Stats. 1937, Ch. 90.)

1779. Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured, or for placing, assisting in placing, or attempting to place, any person in public work, whether the person is to work directly for the State, or any political subdivision or for a

contractor or subcontractor doing public work is guilty of a misdemeanor.

(Added by Stats. 1937, Ch. 90.)

1780. Any person acting on behalf of the State or any political subdivision, or any contractor or subcontractor or agent or representative thereof, doing any public work who places any order for the employment of a workman on public work where the filling of the order for employment involves the charging of a fee, or the receiving of a valuable consideration from any applicant for employment is guilty of a misdemeanor.

(Added by Stats. 1937, Ch. 90.)

Article 3. Working Hours.

1810. Eight hours labor constitutes a legal day's work in all cases where the same is performed under the authority of any law of this State, or under the direction, or control, or by the authority of any officer of this State acting in his official capacity, or under the direction, or control by the authority of any municipal corporation, or of any officer thereof. A stipulation to that effect shall be made a part of all contracts to which the State or any municipal corporation therein is a party.

(Added by Stats. 1937, Ch. 90.)

1811. The time of service of any workman employed upon public work is limited and restricted to 8 hours during any one calendar day, and 40 hours during any

one calendar week, except as hereinafter provided for under Section 1815.

(Amended by Stats. 1963, Ch. 964.)

1812. Every Contractor and subcontractor shall keep an accurate record showing the name of and actual hours worked each calendar day and each calendar week by each worker employed by him or her in connection with the public work. The record shall be kept open at all reasonable hours to the inspection of the awarding body and to the Division of Labor Standards Enforcement.

(Amended by Stats. 1988, Ch. 160.)

1813. The contractor shall, as a penalty to the State or political subdivision on whose behalf the contact is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the State or political subdivision who is authorized to pay the contractor money due him under the contract.

(Amended by Stats. 1963, Ch. 964.)

1814. Any office, agent or representative of the State or any political subdivision who violates any provision of

this article and any contractor or subcontractor or agent or representative thereof doing public work who neglects to comply with any provision of Section 1812 is guilty of a misdemeanor.

(Added by renumbering Section 1816 by Stats. 1961, Ch. 238.)

1815. Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

(Amended by Stats. 1963, Ch. 964.)

Article 5. Securing Workers' Compensation
(Article 5 added by Stats. 1965, Ch. 1000)

1860. The awarding body shall cause to be inserted in every public works contract a clause providing that, in accordance with the provisions of Section 3700 of the Labor Code, every contractor will be required to secure the payment of compensation to his employees.

(Added by Stats. 1965, Ch. 1000.)

1861. Each contractor to whom a public works contract is awarded shall sign and file with the awarding body the following certification prior to performing the work of the contract: "I am aware of the provisions of Section 3700 of the Labor Code which require every

employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

(Amended by Stats. 1979, Ch. 373.)

(Certificate Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: November 6, 1995 Time: 10 a.m. Courtroom: No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

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I. INTRODUCTION

Plaintiff filed this action on July 21, 1995. After service of the Summons and Complaint on July 27, the Defendants named in the Complaint filed a timely Motion to Dismiss under Rule 12 (b) of the Federal Rules of Civil Procedure on August 16. Thereafter, on September 7, Plaintiff filed a First Amended Complaint, naming additional parties in a patent attempt to cure defects in the original Complaint. Defendants filed a second Motion to Dismiss on September 19. That motion is to be heard on November 6.

There has been no discovery in this case nor even an Early Meeting of Counsel pursuant to Rule 6 of the Local Rules. Plaintiff filed the present motion, making personal service on counsel for Defendants an October 16, thereby providing the minimum 21 day notice under Rule 7.4. This motion is also to be heard on November 6.

This action raises a complicated due process challenge to an entire statutory scheme designed to ensure the payment of prevailing wages by contractors involved in public work projects. This premature and seemingly hastily assembled motion is based on unfounded and speculative allegations by the President of Plaintiff concerning the application and administration of the law, and by the unsupported opinions of his attorney, an associate in a law firm with a mere ten years of experience and an unspecified number of trials, concerning the operation of the court system in California.

II. ARGUMENT

A. The Motion Should Be Denied On The Ground That It Is Premature.

It is well settled under the cases that have interpreted Rule 56 of the Federal Rules of Civil Procedure that an application for summary judgment should be denied where the opposing party has had insufficient time to engage in discovery necessary to justify its opposition to the motion. *Grove v. Mead School District*, 753 F. 2d 1528 (9th Cir. 1985) certiorari denied 473 U.S. 826.

Summary judgment "should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 2511 n. 5 (1986).

Here there has been no discovery by either party. Counsel have not even had an opportunity to have an Early Meeting of Counsel, largely due to the fact that Plaintiff has amended its Complaint to forestall Defendants' motion to dismiss. What plaintiff is obviously doing is trying to prevent the Court from ruling rule based on a full evidentiary record.

"A summary judgment is neither a method for avoiding the necessity for proving one's case nor a clever procedural gambit whereby a claimant can shift to an adversary the burden of proof of one or more issues." *Watts v. United States*, 703 F. 2d 346, 347.

Plaintiff may not be permitted to "rush to judgment" in a case containing as many serious and complex issues

as this one. The present motion should accordingly be denied on the ground that it is premature.

B. The Motion Should Be Denied On The Ground That The Supporting Declarations Do Not Comply With The Requirements Of Rule 56(e)

Under Rule 56(e), declarations supporting a motion for summary judgment must be evidentiary in nature and must meet the requirements of the Federal Rules of Evidence. Defendants have contemporaneously filed objections to the Declarations of Itai Ben-Artzi and Stephen A. Seideman on the grounds of lack of foundation, lack of personal knowledge, speculation, and hearsay.

Moreover, our Supreme Court long ago issued a warning about granting summary judgment motions based on opinion evidence, pointing out that in most cases such "evidence" is insufficient as a basis for summary judgment. *Sartor v. Arkansas National Gas Corporation*, 321 U.S. 620, 64 S. Ct. 724 (1944)

The courts have accordingly held that opinions of nonexperts are inadmissible for purposes of summary judgment. *De Pinto v. Provident Security Life Insurance Co.*, 374 F. 2d 50, 55 (9th Cir. 1967) certiorari denied 389 U.S. 822.

The Declaration of Stephen A. Seideman, while it attempts to establish its declarant as an expert on the court system in California, falls far short of the mark in laying the groundwork for such a grandiose claim. Mr. Seideman, according to this declaration, is an associate in a law firm with ten years experience. But the nature of his

experience for this modest length of time is never disclosed. In fact, though he claims to have "practiced civil litigation in state courts in California," he never avers that he has tried even one case in the superior or municipal courts. The conclusionary statement that he is "personally familiar with the amount of time it takes to litigate a civil case in said courts, at both the trial and appellate level," is, incredibly enough, never substantiated with any facts. We are never told if this assertion is based on counsel's personal knowledge or is mere scuttlebutt. Likewise, his admitted "speculation" about the effect of the new "three strikes" sentencing law in criminal cases is simply that, speculation.

Can counsel really expect the Court to strike down an entire statutory scheme designed to preserve the wages of working people based solely on this kind of "expert" testimony? The fact that he apparently does is only further indication of lack of expertise.

C. This Case Does Not Lend Itself To Summary Judgment

This case involves complicated issues of constitutional law as well as serious questions concerning the intent of the individual defendants in performing their duties. At stake is the status of an established and long-standing program for the preservation of prevailing wages on public works.

Our Supreme Court has observed that summary judgment may not be an appropriate vehicle for adjudication of constitutional attacks on the operations of state programs. *Askew v. Hargrave*, 401 U.S. 476, 91 S. Ct. 856

(1971) Such important questions need to be resolved on the fuller record provided at trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S. Ct. 1031 (1948).

"Actions alleging violations of the Due Process or Equal Protection Clauses of the Fifth and Fourteenth Amendments also often cannot be resolved on a Rule 56 motion because the court" must determine malice or intent of the defendants. *Wright & Miller Federal Practice & Procedure*, §2732.2 (Second Edition).

Furthermore, as discussed *infra*, the question of the immunity of the individual defendants in this action involves issues of intent and motive.

"Generally when intent is at issue, a jury should be allowed to draw its own inferences from the undisputed facts unless all reasonable inferences defeat appellants' claims." *Commodity Futures Trading Commission v. Savage*, 611 F. 2d 270, 282-283 (9th Cir. 1979).

The resolution of these complicated issues is clearly more suited to a full trial on the merits. The motion for summary judgment should accordingly be denied on this ground as well.

D. The Existence Of Genuine Issues Of Material Fact Preclude Summary Adjudication Of This Case

As the moving party, Plaintiff has the clear burden of showing the absence of a genuine issue as to any material fact, and therefore the declarations filed in support of the motion must be viewed in the light most favorable to

defendants. Rule 56 (c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598 (1970).

As Defendants' Statement of Genuine Issues of Material Fact demonstrates, there are a number of fundamental disputed issues in this case. There is also a failure on Plaintiff's part to even make a showing with respect to certain elements of their due process argument. Some of the most prominent disputed issues are the knowledge and intent of the individual defendants, the issue of justification of state action, and the availability of timely review of that action.

Thus, in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), the Supreme Court reaffirmed a three-part test to determine when it was appropriate for the government to seize property without affording a prior notice and hearing. The three inquiries are: whether the seizure is "directly necessary to secure an important governmental or general public interest", whether there is a need for "prompt, action," and whether the seizure was necessary and justified in the particular instance. While the Declaration of Michael Villeneuve addresses these three points, the moving papers do not. There is a complete lack of evidence submitted on these questions, Plaintiff taking the simplistic and utterly unwarranted position that due process requires a prior notice and hearing in all cases.

The averments of the Declaration of Stephen A. Seidman concerning timeliness of a hearing, for example, are directly controverted by the Declaration of Michael Villeneuve filed in opposition. It is not the function of the Court on summary judgment either to resolve issues of fact based on conflicting expert testimony (*Scharf v. U.S. Attorney General*, 597 F. 2d 1240, 1243) or to resolve a genuine issue of credibility (*Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S. Ct. 487 (1962)). These are issues that must be presented to the trier of fact at a full evidentiary hearing.

In summary, plaintiff's hastily constructed motion for summary judgment is premature, defective, and inappropriate, and should be denied for all of these reasons.

E. Plaintiff's Injuries, Consisting Solely of Indirect Adverse Effects of Governmental Action, Are Not Actionable.

Exhibit E to the Declaration of Itai Ben Artzi makes it apparent that plaintiff was a subcontractor with respect to each of the projects in issue. It is indisputable that the only action taken by Defendants, the issuance of the various notices, was taken solely against the prime contractors, who thereafter unilaterally chose to withhold monies from plaintiff for work performed under their subcontracts. By prosecuting this action plaintiff is, in effect, trying to interject itself in a dispute between the prime contractors and the State of California. Defendants accordingly contend that under these facts, plaintiff has no claim for deprivation of due process. The Supreme Court has long held that facts such as those disclosed, in this case cannot constitute a basis for relief under the due process clause.

"Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the *indirect adverse effects* of

governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:

> 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S. Ct. 2467 (1980) (Emphasis added).

In *O'Bannon* a group of patients sued to prevent a state from cutting off reimbursement of medical expenses to a medical facility where the patients lived without affording members of the group a hearing. The revocation, if upheld, would have required these patients to move to another facility in order to continue to be eligible for medical benefits. While they were all clearly injured by the impending revocation, the Supreme Court held that the detriment the patients experienced was only *indirect* because the action of the state was against the facility and not directly against them. Since they were only indirectly impacted, they could not claim a deprivation of due process because they were denied a hearing. As the Supreme Court took pains to point out, these patients' rights, if any, were against the hospital and not against the public entity.

This fundamental principle of constitutional law, that indirect deprivations of property rights are nonactionable, has been given wide ranging application in a variety of factual situations.

In *Castaneda v. U.S. Department of Agriculture*, 807 F 2d 1478, 1480 (9th Cir. 1987), a store manager sued the Department of Agriculture because that agency had closed the store where he worked as a result of food stamp violations, causing him to lose his job. He claimed he had the right to a hearing prior to such action being taken. Relying on *O'Bannon*, the Ninth Circuit held that Castaneda had no due process claim because he was only indirectly adversely affected by the action of the Department of Agriculture.

In *Grove City College v. Bell*, 687 F. 2d 684, 704 (3rd Cir. 1982), a college refused to execute certain federal forms required under statutes administered by the United States Department of Education, causing that agency to revoke all student loans and aid at the college without affording a hearing to the affected students. Citing *O'Bannon*, the court held that the students had no claim for violation of due process because they were only indirectly affected by the Department of Education's action.

In *Nuclear Transport & Storage, Inc. v. United States*, 890 F. 2d 1348, 1354 (6th Cir. 1989), a radioactive waste storage company was impacted when the U.S. Department of Energy began offering free storage facilities to its customers without granting a hearing prior to taking this action. The court held the company was only indirectly impacted under the reasoning of *O'Bannon* and could therefore state no claim for violation of its due process rights.

There can be no logical distinction drawn between the position of the aggrieved parties in these cases and the position of plaintiff here. The State of California acted

to enforce its contractual and statutory rights solely with respect to the prime contractors. While plaintiff has undoubtedly suffered some initial detriment as a result of these prime contractors' withholding of funds, its rights, if any, are against the prime contractor and not these defendants. Any adverse impact which plaintiff has suffered is clearly indirect within the meaning of *O'Bannon* and its progeny and cannot give rise to a claim of deprivation of due process under the reasoning of those cases.

Based on the facts of this case, it is apparent that plaintiff is, at best, only indirectly impacted by the action of defendants. The motion for summary judgment should therefore be denied.

F. The Due Process Clause Does Not Guarantee Plaintiff A Pre-Deprivation Hearing In This Case

The gravamen of plaintiff's claim is that it was denied a pre-deprivation hearing by defendants in violation of its due process rights. This contention presumes that plaintiff necessarily possessed a constitutional right to a pre-deprivation hearing, a presumption that is unwarranted in light of present day law.

The extent to which the due process clause mandates a hearing prior to the deprivation of property rights was carefully considered by the Supreme Court in *Mathews v. Elridge*, 424 U.S. 319, 333 (1976). That Court made clear that the question of whether a pre-deprivation hearing must be afforded consistent with principles of due process was not a black and white matter. Reviewing the cases on this subject, the Court stated:

"These decisions underscore the truism that 'due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)." Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests affected.

The Court in *Mathews* pointed out that there were three factors which must be balanced to determine the need, if any, for a pre-deprivation hearing: 1. the private interest to be affected: 2. the risk of an erroneous deprivation of interest through the procedures used and the probable value of additional procedural safeguards: and 3. the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. 424 U.S. at pp. 332-335.

Taking these factors in order, we note that the first factor, the private interest to be affected, is unquestionably an interest, as pointed out hereinabove, that is only indirectly impacted by the State of California, inasmuch as the Defendants' action was directed only to the prime contractors and not to plaintiff. Despite some superfluous references in the Complaint to the rights of the prime contractors, plaintiff cannot stand in the shoes of these entities, entities that are not even before this court.

The interest of the State of California in preserving prevailing wage rates in public works contracts is treated

fully in the Declaration of Michael Villeneuve. Suffice it to say at this point that Defendants' purposes in this area, including both the preservation of workers' economic rights and the prevention of unfair competition among competing contractors, is of compelling importance.

A prime contractor is empowered to bring suit against the contracting agency under California Labor Code Section 1773 for all wages and penalties alleged to have been improperly withheld. In view of the efficient processing of cases in the courts in Southern California through the ubiquitous fast track procedures, (see Villeneuve declarations), this constitutes a timely and appropriate means of review of State action in these cases. Such a remedy is consistent with enlightened concepts of due process.

The Davis-Bacon Act (40 U.S.C. Section 276 (a), et. seq.) requires contractors performing on federal public works projects to pay prevailing wages to their employees. The statute similarly provides for notification by the Department of Labor to the contracting agency to withhold funds without a prior hearing where the Department of Labor has determined that there is a violation of the prevailing rates standards. Due process challenges to this procedure are therefore instructive in this case.

The Court in *Ames Construction Co. v. Dole*, 727 F. Supp. 502 (D. Minn. 1989) reviewed the cases which have examined the validity of this withholding procedure under due process standards.

> "To date, the three courts that have considered whether the government may withhold funds

> from a contractor for suspected violations of the Davis-Bacon Act prior to a hearing have all affirmed the practice. *Fry Bros. Corp. v. HUD*, 614 F. 2d 732 (10th Cir. 1980); *Winzeler Excavating Co. v. Busch*, 694 F. Supp. 362 (N.D. Ohio 1988); *Ray v. United States Department of Labor*, 100 Labor Cases (CCH) 1134 (C.D. Ill. 1984)
>
> In *Fry Bros.*, a subcontractor on a federally-supported housing project brought an action form declaratory and injunctive relief after a dispute arose between it and the federal government under the Davis-Bacon Act. The Court sustained the district court's dismissal of the complaint for failure to state a claim. In a brief opinion, the Court held that "the shut down and withholding of funds is provided for by statute, 40 U.S.C §276a(a), and the corporation had no right to the 'hearing' that it claims was wrongfully denied.' *Fry Bros.*, 614 F. 2d at 734.
>
> In *Winzeler*, a contractor sought declaratory and injunctive relief alleging that the withholding of government contract funds prior to a hearing on alleged prevailing wage rate infractions constituted a violation of due process. Plaintiff argued that the Davis-Bacon Act was unconstitutional not only because it failed to provide a hearing before the payment suspension, but also because it contained no provision for a prompt hearing *after* the suspension. The Court in *Winzeler* noted that plaintiff was forced to wait *more than two years* for a hearing and determination while funds were suspended. The Court therefore considered whether the failure to mandate a hearing within a specified time period made Winzeler's deprivation more than a 'temporary' loss of income. The Court

declined, however, to impose timing restrictions upon the Department of Labor because to do so would 'have a disruptive effect on the administrative process.' *Winzeler*, 694 F. Supp. at 367. The Court concluded that the contractor's loss was only temporary, in spite of 'long delays in the administrative process,' *id.* at 368, and that due process concerns would be satisfied by a hearing any time before final deprivation. *See also McCasland v. United States Postal Service*, 82 Labor Cases (CCH) § 33,607 (N.D.N.Y.1977) (similar withholding procedures in the Service Contract Act, 41 U.S.C. §351 not unconstitutional despite lack of notice and an opportunity for adversary hearing prior to withholding; *Ray v. United States Department of Labor*, 10 Labor Cases (CCH) 1134 (C.D.Ill.1984)).

In *Blackhawk Mining Co. Inc. v. Andrus*, 711 F. 2d 753 (6th Cir.1983), the United States Court of Appeals for the Sixth Circuit sustained a similar provision of the Surface Mining Control and Reclamation Act requiring prepayment of proposed penalty assessments into escrow as a condition for administrative review. The Court found that the potential deprivation for plaintiff was 'slight and significantly less than that of the welfare recipient in *Goldberg v. Kelly*, *id.* at 757, noting that the Act required reimbursement of improperly assessed penalties within thirty days with interest. The Court found that the plaintiff's interest in having use of these funds for this period of time was 'not of sufficient magnitude to overcome the government's interest.' *Id.* The Court also noted that the risk of an erroneous deprivation of plaintiff's property interest

was slight, finding that plaintiff had the opportunity to submit written information and the right to an informal conference.

Finally, the Court noted that the Government's interest in prompt assessment and collection of civil penalties to assure compliance with the act was substantial, finding that the prepayment requirement was adopted "to avoid the problem of the noncollection of fines and to discourage delay of the collection process through frivolous appeals.' The Court noted that the statute entitled the operator to formal review of the citation and amount of penalty within thirty days of receipt of the notice of violation, including a full adversarial evidentiary hearing before an ALJ. 30 U.S.C §1268(c); 43 C.F.R. § 4.1152(b)(1). *Accord B & M Coal Corp. v. Office of Surface Mining Reclamation and Enforcement*, 669 F. 2d 381 (7th Cir.1983).

The Court finds that section 276a comports with the requirements of *Fuentes* for a prehearing seizure of property. The issue under *Fuentes* is the importance of the governmental interest. The purpose of the Davis-Bacon Act is to assure that workers on public construction projects are paid prevailing wage rates established for private industry. *McDaniel v. University of Chicago*, 548 F. 2d 689, 693 (7th 1977). As the Supreme Court stated in *United States v. Binghamton Construction Co. Inc.*, 347 U.S. 171, 174 74 S. Ct. 438, 440 98 L.Ed. 594 (1954):

> The language of the [Davis-Bacon] Act and its legislative history plainly show that it was not enacted to benefit contractors rather to protect their employees from substandard earnings, fixing a floor under

> wages on government projects. . . . On its face the Davis-Bacon Act is a minimum wages law designed for the benefit of construction workers.
>
> *Id.* at 176-78, 74 S.Ct. at 441-42. The government here also argues that the importance of Davis-Bacon enforcement lies in the protection of the federal contract bidding process. According to defendant, one of the purposes of the Davis-Bacon Act is to assure that contractors are not given unfair advantage over other contractors based upon cheap labor, and that if a contractor is able to ignore Davis-Bacon requirements, it may deliberately underbid to win the contract. The Court finds that the government's interest here is sufficiently 'important' to warrant preheating suspension.

727 Fed. Supp. at 507-508 (emphasis added).

Based on this line of cases, the Court in *Ames Construction* likewise reasoned that the withholding of funds from the contractor without prior notice or a hearing was not violative of due process given the circumstances before it.

This reasoning is consistent with the purposes and concerns supporting the California law, as specified in the Declaration of Michael Villeneuve filed in opposition to Plaintiff's motion, i.e. the preservation of employees wages, etc., especially since those purposes and concerns reflect unquestionably sound public policy

Under the circumstances reflected in the moving papers, it is apparent that the procedures afforded by Defendants for post-deprivation review by the courts of

the validity of the withholding of wages and penalties is not violative of due process.

G. The California Public Works Statutory Scheme Which Recognizes A Contractual Relationship Between The Awarding Body And The Prime Contractor, Does Not Recognize Privity Of Contract With Subcontractors, and, Thus, State Law Does Not Recognized A Right In A Subcontractor To Claim Money Due Under A Contract Between An Awarding Body And A Prime Contractor

The California courts have consistently held that the right of a subcontractor to recover sums it alleges are due for work performed on a public works project is limited to the rights it has under the stop notice provisions of the California Civil Code. *Cal-Pacific Materials Co. v. Redondo Beach City School District* (1979) 94 Cal.App.3d 652, 655. The *Cal-Pacific* court described the doctrine of privity of contract and explained the remedies available to a subcontractor or materialman:

> "School District contracted with Willens [the prime contractor] and not with Cal-Pacific. Cal-Pacific sold its materials to Western States, Willen's subcontractor, and not to School District. Lack of privity thus precludes recovery by Cal-Pacific unless recovery is permitted because of the stop notice." *Cal-Pacific Materials, supra*, at 656.

In dealing with the prevailing wage statutes, privity of contract is required in order to recover sums "forfeited" by the prime contractor as a result of the failure of that contractor "or by any subcontractor under him or

her" to pay the prevailing wage. As described below, the statutory scheme provides only that the prime contractor (or his assignee) has the right to recover the sums withheld *under the contract*.

H. G&G Does Not Have Standing To Bring This Action To Remedy Rights Under These Public Works Contracts Since It Was Not A Party To Those Contracts

The constitutional provision defining the judicial power of the United States extends the power to cases arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority.

> "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . In both dimensions it is founded in concern about the proper – and properly limited – role of the courts in a democratic society. The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

In this case, where the gravamen of G&G's action is an effort to have the provisions of the Labor Code dealing with the withholding of sums from the general or prime contractor declared unconstitutional as applied to plaintiff, there must be a deprivation of some right which inures to a contractor in G&G's position as a result of the actions by the state agency. But, as pointed out above, G&G has no right to the money withheld by the awarding body and, consequently, can suffer no "injury" attributable to the state or its agencies.

Again, in sum, what G&G's allegations fail to establish is that it has any standing to recover the monies withheld by the awarding body pursuant to the contract between the awarding body and the prime contractor – a contract which does not benefit or relate to G&G. Specifically, G&G asks that this court declare Code §§1727, 1729, 1730, 1732, 1733 and 1775 unconstitutional. But pertinent Labor Code sections cited above have no affect on subcontractors performing public works in California. The cited sections constitute the statutory scheme in California designed to enforce the prevailing wage law through withholding from sums due to *prime contractors under the contract* when they are contracting with awarding bodies. Pursuant to § 1727, for instance, "Deficiencies and penalties are to be withheld by the awarding body from sums due *under the contract*." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986. (Emphasis added) Labor Code §§ 1730 provides that the awarding body is to transfer all wages and penalties that have been withheld pursuant to § 1727 (i.e., under the contract) to the Labor Commissioner. Labor Code § 1732 provides the time frame within which the prime contractor (or his assignee)

must bring and action to recover the sums withheld. The action is to be "on the contract for alleged breach thereof in not making the payment" and this suit is "the exclusive remedy" of the contractor or his assignee. Section 1733 provides that the burden of proof is upon the "contractor or his or her assignee to establish his or her right to the wages and penalties withheld."

Under the clear language of the California Prevailing Wage law it is the contractor who bears liability for wage underpayments made by subcontractors. (Labor Code § 1775) This interpretation comports with case law. In *O. G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434, the prime contractor subcontracted a portion of a public works project to a subcontractor, who then subcontracted a portion of his work. Neither subcontractor paid the prevailing wage to its workers. The state withheld payment to the general contractor to cover the underpayment and the Court of Appeal concluded that this was proper:

> "Plaintiffs entered into a contractual agreement to the effect that they would comply with . . . section 1775 and that they would forfeit to the state $25 per day for each workman paid less than the prevailing wage by either plaintiffs or by their subcontractors, as well as pay to each workman the difference between the prevailing wage and the amount the workman had received. Thus, when [the] subcontractors . . . failed to pay prevailing wages to their workmen, plaintiffs became contractually liable to pay the penalty to the state as well as to pay the wronged workmen the difference in wages." *Id.*, at 462-463.

I. Even If The Plaintiff Had Standing On Behalf Of The Prime Contractors To Question The Actions of The State In Ordering The Withholding Of Unpaid Wages, The Attack On Constitutional Grounds Must Fail

Even if G&G were allowed to attack the constitutionality of the statute in the stead of the prime contractors, G&G would be in no better position than those it would then represent. There is little doubt that the prime contractors who entered into the contracts with the awarding bodies have benefitted from the fact that they did business with the State under the terms of the Act. These contractors would now be estopped to bring an action to test the constitutionality of the statutory scheme which allows the awarding body to withhold sums due under the contract. The admonition of the U.S. Supreme Court in the case of *Fahey v. Mallonee*, 332 U.S. 245, 255 (1947) would be appropriate:

> "It is an elementary rule of constitutional law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' "

See also *Foster v. Superior Court*, 26 Cal.App.2d 230, 234, *Tracy v. McIntyre*, 29 Cal.App.2d 145, and *Madonna v. State of California*, 151 Cal.App.2d 836.

J. The Individual Defendants Are Immune From Suit In This Action

Up until recently plaintiff has forborne from suing agencies of the State of California in this case and has named solely the following public officials: Victoria Bradshaw, as the Labor Commissioner, Lloyd W. Aubry, Jr., as the Director of the Department of Industrial Relations, Daniel Dellarocca, as a Deputy Labor Commissioner, Roger Miller, as a Deputy Labor Commissioner, and Rosa Frazier, as a Deputy Labor Commissioner.

It is well settled that a qualified immunity shields public officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person must have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635, 639-640, 107 S. Ct. 3034 (1987); *Erickson v. U.S.*, 976 F. 2d 1299, 1301 (9th Cir. 1992). It is apparent from those cases that the determination of whether qualified immunity exists does not take place in a vacuum. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken . . . " *Anderson v. Creighton* at 639.

In determining whether a 'clearly established right' existed, the courts must "survey the legal landscape" as it existed at the time of the alleged violation. *Figueroa v. U.S.*, 7 F.3d 1405, 1409 (9th Cir. 1993); *Wood v. Ostrander*, 879 F. 2d 583, 591 (9th Cir. 1989), certiorari denied 493 U.S. 938.

The declarations filed in support of the motion contain no factual averments that some "clearly established" right was violated by these individual defendants. In *Erickson v. U.S., supra*, the Court stated:

> "We have divided the qualified immunity analysis into three inquiries:
>
> (1) the identification of the specific right allegedly violated: (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue."
>
> * * *
>
> "As the Supreme Court has explained herein, if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to 'objective legal reasonableness' that is the touchstone of Harlow [v. Fitzgerald]. Plaintiffs would be able to convert the rule of qualified immunity into a rule of mutually unqualified liability simply by alleging violation of extremely abstract rights . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 3038-39, 97 L.Ed. 2523 (1987): Even if

> Erickson had identified the rights involved with requisite specificity, however, we are aware of no authority that clearly establishes a constitutional right against the kind of official conduct involved in this case." *Erickson v. U.S.* at 1301.

Plaintiff has not cited and cannot cite any case that stands for the proposition that Sections 1727-1731, 1774, 1775, 1777.5 or 1815 are unconstitutional because no court has so held. Officials who implement and enforce these provisions like the individual defendants named herein, have the right to assume these provisions are valid until some court tells them otherwise.

While it has been held not to be necessary for the conduct in question to be previously declared unconstitutional to be found inimical to "clearly established law," the unlawfulness of the public official must have been apparent in light of preexisting law. *Anderson v. Creighton*, supra, 483 U.S. at 640.

It appears at most that the individual defendants merely issued certain notices to awarding bodies who had contracted with the prime contractors regarding the plaintiff's failure to pay prevailing wages without giving a prior hearing to plaintiff.

To argue that actions such as these are outside the scope of qualified immunity is to lose sight of the fundamental policy underlying this well-established doctrine. "The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages'. *Davis* 468 U.S. at 195. Where that rule is applicable, officials can know that they will not be held

personally liable as long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of English and American common law." *Anderson v. Creighton* at p. 646.

In fact the Supreme Court has gone so far as to declare that the qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law". *Malley v. Briggs*, 475 U.S. 335, 341, (1968).

How can plaintiff contend that these officers have violated "clearly established statutory or constitutional rights of which a reasonable person must have known", when the sole and express purpose of this lawsuit is to persuade this court to declare, for the first time, that a due process right to a pre-deprivation hearing exists under the circumstances alleged in the complaint? This is after all, an area of the law where, as the Supreme Court tells us, concepts are "flexible" and vary depending on the particular fact situation confronting the court. *Morrissey v. Brewer, supra*, 408 U.S. at 481.

Even if plaintiff were to prevail in its aforementioned constitutionality argument, a position defendants vigorously dispute, there is nothing in the moving papers to show that these individual defendants were doing anything more than performing their legislatively assigned duties in enforcing and implementing provisions of the California Labor Code and could have no reason to believe that these provisions were unconstitutional in any respect.

K. This Is Not An Appropriate Case For Injunctive Relief Because Plaintiff Has An Adequate Remedy At Law

Plaintiff seeks injunctive relief, stating in conclusionary terms that it has suffered irreparable injury and has no adequate remedy at law. (See Declaration of Itai-Ben Artzi). But these averments show that what is in dispute here is no more than a sum of money which has been withheld from plaintiff by the prime contractors due to the actions of defendants in posting certain notices.

It is significant that the prayer requests not simply status quo relief, but a mandatory injunction preventing defendants "from enforcing, or threatening to enforce, the provisions of California Labor Code && 1727, 1729, 1775 or 1776 against Plaintiff, or any other person, with regard to any 'public works' project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person . . . " Plaintiff is asking for nothing less than a mandatory injunction to accomplish a complete shutdown of the statutory scheme with respect to both itself and all other persons.

To obtain injunctive relief in the federal courts, a plaintiff must demonstrate that his remedy at law is inadequate. *Stanley v. University of Southern California*, 13 F. 3d 1313, 1320 (9th Cir.1994). It must also demonstrate that "it will be exposed to some significant risk of irreparable injury." *Associated General Contracting Co. v. Coalition for Economic Equity*, 950 F. 2d 1401, 1410 (9th Cir. 1991)

certiorari denied 112 S. Ct. 1671; *Caribbean Marine Service Co. v. Baldridge*, 844 F 2d 688 (9th Cir. 1988).

There is nothing about this case as disclosed in the declarations that separates it from a garden variety action for monetary damages or justifies the disfavored remedy of a mandatory injunction.

CONCLUSION

Plaintiff's moving papers are deficient in two principal respects, *i.e.*, critical averments of fact are absent and the remaining averments are directly disputed by the opposing declarations. Plaintiff is therefore unable to show that there is no genuine issue of fact and that it is entitled to judgment as a matter of law. Defendant therefore respectfully requests that the motion for summary judgment be denied.

DATED: October 23, 1995

Thomas S. Kerrigan
Michael Villeneuve
DIVISION OF LABOR
STANDARDS ENFORCEMENT
Department of Industrial
Relations
State of California

/s/ Thomas S. Kerrigan
THOMAS S. KERRIGAN
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(Declaration Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) STATEMENT OF GENUINE ISSUES OF MATERIAL FACT DATE: November 6, 1995 TIME: 10 a.m. Courtroom: No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	

Defendants, through their counsel of record in this action, Thomas S. Kerrigan and Michael S. Villeneuve, pursuant to Local Rule 7.14.2, submit the following Statement of Genuine Issues of Material Fact:

1. The Division of Labor Standards Enforcement, the agency mandated to enforce the prevailing wage requirements of the California Public Works Law (California Labor Code Sections 1730-1815) has interpreted the purposes of that Act to be to benefit workers and to prevent unfair competition in the construction industry.

(Declaration of Michael S. Villeneuve, Page 2, lines 14-19)

2. Prior to the issuance of a Notice to Withhold, each Deputy Labor Commissioner undertakes an investigation of the facts of the alleged violation and then submits his findings to the Senior Deputy Labor Commissioner for authorization to issue the Notice. The Senior Deputy must determine that there has been a violation of the law before approving issuance of the Notice.

(Exhibit 4 to Declaration of Stephen Seideman (Miller Depo. Pages 34-35, 179); (Garza Depo. Pages 63-64)

3. The issuance of Notices to Withhold ensures the timely collection of wages owed to employees.

(Declaration of Michael S. Villeneuve, Page 2, line 20-Page 3, line 28)

4. G & G Fire Sprinklers, Inc. acted solely as a subcontractor on the projects in question in this action.

(Declaration of Itai Ben-Artzi, Exhibits 2A-2D)

5. G & G Fire Sprinklers, Inc. was only indirectly impacted by the issuance of the complained of Notices to Withhold, these Notices having been issued directly to the prime contractor.

(Declaration of Itai Ben-Artzi, Exhibits 2A-2D)

6. Prevailing wage suits filed in the Southern California courts under the "fast track" rules and procedures generally come to trial within nine to 15 months after such filing.

(Declaration of Michael S. Villeneuve, Page 4, lines 1-27)

7. Enforcement of the California Public Works Law has resulted in the collection of millions of dollars in unpaid wages for California construction workers, and has further led to enforcement of the State of California's labor standards.

(Declaration of Michael S. Villeneuve, Page 4, line 28-Page 5, line 15)

8. The State of California has a legitimate and compelling interest in enforcing its procedures under the California Public Works Law.

(Declaration of Michael S. Villeneuve, Page 1, line 14 to Page, line 28)

9. The California Public Works Law and the policies and procedures promulgated thereunder have repeatedly withstood constitutional and other legal attacks.

(Declaration of Thomas S. Kerrigan, Page 2)

10. The parties to this action have neither had an Early Meeting of Counsel pursuant to Local Rule 6 nor engaged in any discovery.

(Declaration of Thomas S. Kerrigan, Page 2)

Dated: October 23, 1995

Thomas S. Kerrigan
Michael S. Villeneuve
DIVISION OF LABOR LAW ENFORCEMENT
Department of Industrial Relations
State of California

By: /s/ Thomas S. Kerrigan
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 ER (BQRx) DECLARATION OF THOMAS S. KERRIGAN IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: November 6, 1995 Time: 10 a.m. Courtroom: No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	

I, Thomas S. Kerrigan, declare and say:

1. I was admitted to the California Bar and the United States District Court for the Central District of California in 1965. I remain licensed to practice before all courts in the state of California.

2. Since May of 1995 I have been employed by the State of California, Department of Industrial Relations, Division of Labor Standards Enforcement as a Staff Attorney. I am one of the attorneys for defendants herein.

3. This action was filed on July 21, 1995. Defendants filed a timely motion to dismiss pursuant to Rule 12(b) on August 16. Thereafter, on September 7, plaintiff filed a First Amended Complaint. Defendant filed a second motion to dismiss on September 19, noticing that motion for a hearing on November 6. Plaintiff subsequently personally served the present motion for summary judgment on October 16, giving defendants the minimum notice sanctioned by Local Rule 7.4.

4. Neither party has engaged in any discovery in this case. There has been no Early Meeting of Counsel pursuant to Rule 6 of the Local Rules.

5. As a Staff Attorney for the Division of Labor Standards Enforcement, I am charged with keeping current on the status of the various provisions of the California Labor Code and advising the Deputy Labor Commissioners employed by the Division concerning the legal effect of these provisions. To my knowledge, none of the provisions of the California Public Works Law has been declared unconstitutional or otherwise invalid by any court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of October, 1995 in Los Angeles, California.

DATED: October 23, 1995

Thomas S. Kerrigan
Michael Villeneuve
Division of Labor Standards
Enforcement
Department of Industrial Relations
State of California

/s/ Thomas S. Kerrigan
THOMAS S. KERRIGAN
Attorney for Defendants

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
BY: THOMAS S. KERRIGAN, Bar No. 36003
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) DECLARATION OF MICHAEL S. VILLENEUVE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: November 6, 1995 Time: 10 a.m. Courtroom No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

I, MICHAEL S. VILLENEUVE, declare and state:

1. If called upon to testify to the matters set forth hereinafter, I would competently testify thereto, based on my own personal and direct knowledge.

2. I am a member in good standing of the State Bar of California, and have been licensed to practice before the Courts of the State of California since 1978. I have been admitted to practice before the United States District Court for the Central District of California since April 27, 1989.

3. I am employed by the State of California, Department of Industrial Relations, Division of Labor Standards. My duties include handling all public works cases for all counties south of Fresno.

4. The Division of Labor Standards Enforcement, the agency mandated to enforce the prevailing wage requirement of the California Public Works Law (California Labor Code §§ 1730-1815) has interpreted the legislative purpose of this Act to be to benefit workers and to prevent unfair competition in the construction industry.

5. Over the last two and a half years, I have been assigned to handle litigation in several public works cases where there have been difficulties in enforcing prevailing wage violations against the payment bond. In some cases the public works entity or awarding body which let the contracts failed to require the posting of the bond. In other cases, the bond was "issued" by phony Cayman Island companies which where [sic] not registered to do business by the California State Insurance Commissioner. In many of those cases, there were no assets to back up the bond, and the unpaid wages and penalties were uncollectible. In at least two other cases the surety company which issued the payment bonds were insolvent, and/or in receivership. In at least one other case a Superior Court Judge in Arizona issued an order purporting to enjoin any proceedings against the surety company which issued the bond.

6. Nor is it always feasible to enforce the prevailing wage statutes against the general contractor after the project has been completed and the public funds disbursed. I have been a labor attorney with a major emphasis in construction related cases for well over fifteen (15) years. It has been my experience that the vast majority of construction contractors, especially the smaller contractors, are undercapitalized, and may have virtually no assets. It is not uncommon for these contractors, may [sic] of whom have incorporated, to cease doing business the minute a claim for unpaid wages comes forth, only to reopen under a different corporate entity the next day. Any equipment, vehicles, tools or other assets are usually held in the name of a third party, and leased to the contractor. The contractor need only post a

bond in the amount of $7500 (until recently it was only $5000) against wage and other claims. The premium for these bonds is very small. The priority for wages is only $4000, is subject to pro ration with all valid wage claims from all projects, and is subject to a set off of attorneys' fees in the event the bond proceeds are the subject of an interpleader action, a common occurrence. It is quite often that the remainder would be insufficient to cover the legal fees incurred in proceeding against such a bond.

7. In a previous case, plaintiff G & G Fire Sprinklers, Inc. (hereinafter referred to as "G & G") was a subcontractor on a project at UCLA. The Notice to Withhold was served on the University and the General Contractor, American Constructors, California, Inc. (hereinafter referred to as "ACCI") in late May, 1994. After service of the summons and complaint against the Regents in late May, 1994, counsel for the Regents tendered the defense of the lawsuit to me. The matter was set for trial on April 24, 1995, less than a year after service of the summons and complaint.

8. Due to "fast track" rules and procedures in most state courts, it has been my experience that most of these lawsuits go to trial, if they are not settled or disposed of by pretrial motions within nine to fifteen months after filing. Although the cases are not entitled to any statutory priority in case setting, the parties to these actions are usually successful in obtaining early trial dates, based on the acknowledged need to obtain prompt payment of wages, and the contractor's wishes to have the case resolved as soon as possible, so that any of the withheld funds which are not found due under the statute as either wages, penalties, costs or attorneys' fees can be remitted

to the contractor. The state courts have unerringly been receptive to the setting of the earliest possible trial dates in these cases. I have read the Declaration of Stephen A. Seidman [sic] filed in support of the Motion for Summary Judgment and strongly disagree with his estimate regarding the time it takes to go to trial in these cases.

9. During the past three years I have been the lead counsel in approximately two hundred fifty public works cases. Every case but one resulted in either a judgment or a settlement wherein wages were remitted to DLSE for disbursement to employees. In the once case referred to, DLSE voluntarily dismissed the case upon review of documents produced in discovery. In the last fiscal year, my office has collected approximately one and a half million dollars in unpaid wages and penalties (the substantial majority of this money was for unpaid wages). It is my understanding that the numbers and results are virtually similar in Northern California, demonstrating a substantial problem with obtaining compliance by contractors, and highlighting the state's need to utilize the withhold [sic] provisions of the public contracts with construction contractors in order to enforce those contracts, and thus uphold the state's minimum wage standards.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of October 1995 at Los Angeles, California.

/s/ Michael S. Villeneuve
MICHAEL S. VILLENEUVE

DIVISION OF LABOR STANDARDS ENFORCEMENT
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) OBJECTIONS TO DECLARATIONS FILED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [FRCP56(e) Date: November 6, 1995 Time: 10 a.m. Courtroom: No. 8 (Filed Oct. 23, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

Defendants object to the Declarations of Itai Ben-Artzi and Stephen A. Seideman, pursuant to the provisions of Rule 56(e) of the Federal Rules of Civil Procedure, based on each of the following grounds:

Declaration of Itai Ben-Artzi

Page 1, lines 15-25	Lack of foundation, lack of personal knowledge.
Page 2, lines 19-21	Lack of foundation, lack of personal knowledge.
Page 2, lines 22-28	Lack of foundation, lack of personal knowledge.
Page 3, lines 1-11	Lack of foundation, lack of personal knowledge.
Page 5, lines 1-14	Lack of foundation, lack of personal knowledge, conclusionary, speculative

Declaration of Stephen A. Seideman

Page 1, Line 28-Page 2, line 8	Lack of foundation, lack of personal knowledge, speculative.
Page 2, lines 6-17 (and attached exhibits)	Lack of foundation, hearsay

DATED: October 24, 1995

Thomas S. Kerrigan
Michael Villeneuve
DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
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/s/ Thomas S. Kerrigan
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CIVIL NO. 95-4839 R PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. DEPT: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

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I. INTRODUCTION

Plaintiff hereby replies to Defendants' opposition to Plaintiff's motion for summary judgment.

Defendants' opposition raises, essentially, four points. Defendants argue that (1) the motion is premature, (2) there is a triable issue of fact, (3) the statutory procedure. complies with due process, and (4) Plaintiff does not have standing to raise the issue. Each of the aforesaid contentions is without merit for the reasons set

forth in the moving papers, and as further set forth below.

II. THE MOTION IS NOT PREMATURE

Plaintiff's motion is not premature. Rule 56 allows a motion for summary judgment to be made any time more than twenty days after commencement of the action.

Plaintiff filed a similar lawsuit against Defendants previously. Plaintiff made, essentially, the same motion in the prior case. The prior motion relied on the same authorities cited in the moving papers herein. Thus, Defendants' counsel was aware of the argument and authorities for at least six months before this motion was filed.

There is no discovery needed by Defendant to oppose this motion Defendants' opposition does not identify any discovery which is necessary to oppose the motion. The motion raises an issue of law as to the constitutionality of statutes, and the application thereof. There is no dispute as to the statutory procedures in question. There is no discovery required to address the issue.

III. THE ISSUE IS APPROPRIATE FOR SUMMARY JUDGMENT

The issue raised is a matter of law. Therefore, it is appropriate for summary judgment. There have been numerous cases in which due process challenges have been resolved by summary judgment. (*See*, e. g., *U.S. v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492,

126 L.Ed.2d 490 (1993); *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D.Alaska 1993). There is no need for a trial to resolve an issue of law.

IV. THERE IS NO TRIABLE ISSUE OF FACT

The opposition papers do not raise any triable issue of fact. The purported triable issue of fact asserted by Defendants is the time needed to reach trial in a state court case filed under *Cal. Labor Code* § 1730 et. seq. There is no triable issue of fact in this regard, nor at all.

A. There is no triable issue of fact as to the time for a trial

Defendants assert that Plaintiff's statement as to the time required for a trial in state court is incorrect. Defendants assert that lawsuits filed in state court under *Cal. Labor Code* § 1730 et. seq. are set for trial within nine to fifteen months of filing (*see*, Defendants' Statement of Genuine Issues of Material Fact). The procedure is unconstitutional, even if Defendants' assertion of the fact is accepted as true. Therefore, there is no issue of material fact. The procedure violates due process, even accepting Defendants facts, for the following reasons (which are discussed more fully in other parts of the moving and reply papers): (1) The right to a hearing nine to fifteen months after the deprivation is not a prompt post-deprivation hearing, (2) even after a judgment in favor of the contractor, the money remains held pending appeal, (3) a

pre-deprivation hearing is required, and (4) a subcontractor aggrieved by a notice to withhold has no right to a hearing at any time.

If any of the four points set forth above is correct, Plaintiff is entitled to summary judgment. Since the procedure is unconstitutional, even accepting Defendants facts, there is no genuine issue of material facts. The Court may accept as true Defendants' assertions that a trial may be had within nine to fifteen months.

B. The other assertions in Defendants' Statement of Genuine Issues of Material Fact do not raise any triable issue of fact

The other assertions of fact by Defendant do not raise any triable issue of fact. The declaration of Michael Villeneuve states that many contractors are undercapitalized, and easily forced out of business by a notice to withhold. The declaration also states that of two hundred and fifty notices to withhold all but one resulted in a settlement or judgment wherein some money went to DLSE. Even if true, the aforesaid assertions do not render the procedure consistent with due process. To the contrary, the aforesaid facts support Plaintiff's contention. The aforesaid facts underscore the manner and extent to which DLSE can coerce settlements from contractors by withholding money without a hearing. (For example, the two hundred fifty cases include those which Plaintiff settled wherein almost all the money was released, but DLSE kept a small portion. Although Plaintiff denied the merits of the claim by DLSE, the settlement was made because of the need for the money being released, and the

cost to litigate would exceed the amount forfeited to DLSE).

The declaration also vaguely states that of two hundred fifty cases, there were "several" in which there were difficulties in collection on the surety bond. This statement does not raise any triable issue of fact. The fact that a few cases may arise out of hundreds wherein there may be difficulty with a surety bond does not justify a procedure of wholesale withholding without a hearing. Also, the stop notice procedure under the California Civil Code may be used to secure funds claimed as wages. Furthermore, there is no prompt post-deprivation hearing in any event.

Finally, defendant asserts that the State has an important interest in enforcing the prevailing wage law. The aforesaid assertion is merely argument, and does not raise any issue of fact. Furthermore, Plaintiff has not disputed that the State has an interest in enforcing it's prevailing wage law. Plaintiff merely asserts that such enforcement must be done in a constitutional manner. A State always has an interest in enforcing it's laws. Nevertheless, the mandates of due process must be observed.

Defendant has not raised any triable issue of fact. Summary judgment is appropriate.

V. THE OPPOSITION DOES NOT REBUT THE CONTENTION THAT THE PROCEDURE DOES NOT COMPLY WITH DUE PROCESS

In opposition Defendants assert that due process does not require a pre-deprivation hearing. The opposition is without merit because (1) there is no prompt

post-deprivation hearing, therefore, the procedure in [sic] unconstitutional whether a pre-deprivation hearing is required or not, (2) an aggrieved subcontractor has no right to a hearing at any time, and (3) a pre-deprivation hearing is required.

Defendants rely on *Mathews v. Elridge* 424 U.S. 319 (1976) and *Ames Const. v. Dole* 727 F.Supp. 502 (D. Minn. 1989). Defendants' reliance on these cases is misplaced.

A. *Mathews* does not establish that no pre-deprivation hearing is required

Mathews did not concern the question of whether a predeprivation hearing was required, but rather the type of hearing. In this case, the procedure provides for no pre-deprivation hearing of any type. Therefore, *Mathews* is inapplicable. Defendants are correct that the type of hearing required may vary with the circumstances. For example, in *U.S. v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) the court held that with regard to seizure of property used for drug dealing, an ex parte hearing before a federal magistrate was not a sufficient hearing. Since no hearing of any type is provided for under the California Labor Code, the procedure is clearly unconstitutional.

Furthermore, *Mathews* is distinguishable for a number of other reason [sic].

Mathews concerned termination of disability benefits. In *Mathews* there was a pre-deprivation procedure mandated whereby the evidence supporting termination was forwarded to the recipient, and an opportunity to offer

other evidence provided. There is no such procedure under, the Cal. Labor Code.

In *Mathews* the decision was based on a medical determination of disability, which was made by a doctor. The government official making the eligibility determination did not make the medical determination of disability. There is no such independent objective determination with regard to the issuance of a notice to withhold.

In *Mathews* there were extensive post-deprivation procedures providing for prompt review of the decision. There is no such procedures [sic] in this case.

In *Mathews* the only issue was the existence of a medical disability. In this case the issue is not merely the existence of a violation, but the amount thereof. A hearing is necessary to determine the correct amount of withholding.

Mathews did not involve the imposition of punitive sanctions, as does this case. Thus, the holding in *U.S. v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) is applicable to this case.

The Supreme Court has repeatedly stated that due process requires a pre-deprivation hearing for a temporary deprivation, except in emergency circumstances for which a prompt post-deprivation hearing is required. This requirement was recently reiterated in *Daniel*. *Mathews* merely stands for the proposition that where a pre-deprivation hearing is required, it need not be a full judicial type hearing in all circumstances. Since there is no pre-deprivation hearing at all under the procedure in

this case, *Mathews* is not applicable. *Mathews* does not rebut the points set forth in Plaintiff's moving papers.

B. Defendants' reliance on *Awes Const. v. Dole* is misplaced

Defendants cite *Ames Const. v. Dole* 727 F.Supp. 502 (D.Minn. 1989). *Ames* supports Plaintiff's position. In *Ames* the court held that withholding money on account of alleged prevailing wage violations was a deprivation of property requiring due process. *Ames* held that withholding without a prompt post-deprivation hearing was unconstitutional. The procedure in California does not provide for a prompt post-deprivation hearing. Therefore, under the reasoning of *Ames*, it is unconstitutional.

In finding a pre-deprivation hearing was not required, the *Ames* court did not consider the distinction between cases where there is an independently established objective fact which is the basis of the action. As the court explained in *Chalkboard v. Brandt* 902 F.2d 1375, 1381 (9th Cir. 1989), the need for a predeprivation hearing is less in such cases, since the likelihood of mistake is small. *Ames* relied on *Barry v. Barachi* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) and *Federal Deposit Insurance Corporation v. Mallen* 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988). *Barry* involved a procedure providing for suspension based on a chemical drug test, and *Mallen* based on a criminal indictment. In each of said cases the Court held a pre-deprivation hearing was not required, but the procedure must provide for a prompt post-deprivation hearing. As stated in *Mallen*, "an important

governmental interest, *accompanied by a substantial assurance that the deprivation is not baseless or unwarranted,* may in *limited cases demanding prompt action* justify postponing the opportunity to be heard until after the initial deprivation." *Mallen* 108 S.Ct. at 1787.

In *Mallen* and *Barry* there was an independent objective determination to provide substantial assurance that the deprivation was not baseless, i.e. chemical test or criminal indictment. The court in *Ames* failed to consider this important distinction.

The aforesaid point was made clear in *U.S. v. James-Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), wherein seizure of property used for drug dealing after ex parte hearing (with full hearing later) was held unconstitutional. The court stated that "the practice of ex parte seizure, moreover, creates an unacceptable risk of error."

Subsequent to *Ames*, the court in *Bailey v. Secretary of the United States Department of Labor* 810 F.Supp. 261 (D.Alaska 1993) held that a pre-deprivation hearing was required for withholding due to alleged violations of the prevailing wage law.

The ruling in *Ames* that no pre-deprivation hearing was required should not be followed for the reasons stated above, and in the moving papers. Moreover, even under the reasoning of *Ames* the procedure herein is unconstitutional, as there is no prompt post deprivation hearing.

C. The other cases cited do not rebut Plaintiff's position

Defendants quote the discussion of selected cases in the *Ames* opinion. The cases referred to are *Blackhawk v. Andrus* 711 F.2d 753 (6th Cir. 1983), *Winzeler v. Busch* 694 F.Supp. 362 (N.D. Ohio 1988), and *Fry Bros. v. HUD* 614 F.2d 732 (10th Cir. 1980). The aforesaid cases do not rebut Plaintiff's position.

Blackhawk involved penalties for violations of the mining act. Under the procedure, a notice of violation and proposed penalty is sent in writing. The party may submit any evidence it deems relevant. Thereafter, a conference as to the alleged violation is held with an official who had no previous involvement with the case. Based on the conference a penalty may be assessed, and withholding allowed. A full hearing before an administrative law judge must [sic] provided within thirty days thereafter. However, in this case there is no procedure for a pre-deprivation conference, or for a prompt post-deprivation hearing. Thus *Blackhawk* is not applicable to this case.

The court in *Winzeler* held that withholding due to prevailing wage violations did not invoke due process rights because the deprivation was "temporary." The analysis was incorrect. A temporary deprivation does invoke due process rights to hearing. *U.S. v. James Daniel Good Real Property* 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). The holding in *Winzeler* was rejected in *Ames* and *Bailey*. Moreover, it is inconsistent with the Supreme Court holding in *Daniel*.

Fry concerned a challenge to the amount set as the standard prevailing wage for certain workers for federal

projects. The court granted a motion to dismiss on the grounds that the wage determination is not reviewable under federal law, except as to procedural irregularities in determining the wage standard. The court stated that the complaint did not allege any facts sufficient to raise any such due process issue. *Fry* is not applicable to this case. *Fry* did not address any of the due process issues raised herein.

The requirements of due process, as set forth by the Supreme Court, clearly establish that the procedure in the Cal. Labor Code is unconstitutional. The authorities cited by Defendant do not establish otherwise.

VI. PLAINTIFF HAS STANDING

Defendants' contention that Plaintiff does not have standing has no merit. Plaintiff is a contractor who has performed work on public work projects as both a prime and subcontractor, and intends to continue to do so. Plaintiff has been subjected to repeated notices to withhold (which Plaintiff contends are meritless). Presently, over $100,000 is being withheld from Plaintiff on account of notices to withhold issued by Defendants. Plaintiff has standing to raise. the issues herein.

Plaintiff addressed the issue of standing, including the contention that Plaintiff's injury is indirect, in Plaintiff's Opposition to Defendants' Motion to Dismiss, parts V. and VIII. Plaintiff incorporates by reference said argument as though set forth fully herein.

Plaintiff explained in the opposition to the Motion to Dismiss that whether Plaintiff has privity of contract with

the awarding bodies for a particular project is immaterial, since this is not a breach of contract suit. Moreover, it should be noted that the California prevailing wage laws are statutory, not contractual obligations.

A. California prevailing wage laws are statutory, not contractual obligations

In *Lusardi v.* [sic] *Construction v. Aubry* 1 Cal.4th 976; 4 Cal.Rptr.2d 837 (1992) the California Supreme Court held that California prevailing wage laws were statutory, not contractual obligations. In *Lusardi* a project was built pursuant to an agreement between a public entity and a private owner. The construction was considered a private project, with Lusardi being hired as the contractor by the private owner. The contract with Lusardi did not require payment of prevailing wages. Subsequently, DLSE asserted that the project was subject to the prevailing wage laws, and that Lusardi was liable for underpayment of wages. Lusardi asserted that since it's contract did not require payment of prevailing wages, it could not be liable. Lusardi argued that any action by DLSE must be against the awarding body. DLSE asserted that the prevailing wage laws were statutory, not contractual obligations. Thus, DLSE contended that it was immaterial whether the obligation to pay prevailing wages was in Lusardi's contract. The California Supreme Court agreed with DLSE, and held that the prevailing wage laws were statutory, not contractual obligations.

VII. PLAINTIFF IS NOT ESTOPPED TO RAISE THE ISSUE

The assertion by Defendants that Plaintiff is estopped to raise the issue is without merit. The argument is addressed in Plaintiff's Opposition to Defendants' Motion to Dismiss at part X, which is incorporated herein by reference.

Simply put, Plaintiff cannot be estopped from seeking prospective relief. Moreover, performing public works projects does not estop one from challenging unconstitutional enforcement procedures. Defendants argue that one must contract with the awarding body to have standing to sue, but by doing so one is estopped to sue. Obviously, this is not correct.

Mandating that certain provisions be included in contracts does not render unconstitutional statutes valid.

> "Where a statute peremptorily requires certain clauses to be inserted, however, as is the case here, such clauses are not binding if the statute is found unconstitutional. Thus, the constitutional issue in this instance is not extinguished by plaintiff's voluntary entry into a contractual arrangement."

Winzeler supra. 694 F.Supp. at 366.

The issue of estoppel in a similar case was addressed in *Salla v. County of Monroe* 64 A.D.2d 437, 409 N.Y.S.2d 903 (1978). In *Salla,* a contractor challenged the constitutionality of a statute requiring resident labor. The court held that the Plaintiff was not estopped by performing a contract containing the requirement. The court stated:

> "We do not deem Lisbon's acceptance of the construction contract to be a waiver of its constitutional rights because a public contract should not be conditioned on a waiver on constitutional rights. Nor do we believe that Lisbon's attempts to comply with the statute in order to avoid breaching the construction contract constitute a waiver of the right to challenge its constitutionality."

Id. at 906-907 [Citations omitted].

VIII. PLAINTIFF DOES NOT HAVE AN ADEQUATE REMEDY AT LAW

Defendants assertion that Plaintiff has an adequate remedy at law in incorrect. The unconstitutional action which is challenged is the seizure of money without a hearing, and then requiring the party to pursue a lawsuit to recover the money. Certainly, the right to sue for the money is not an adequate remedy.

Plaintiff suffers irreparable injury from the inability to fund its business operations, and the damage to reputation in the industry. *See,* Plaintiff's Statement of Uncontroverted Facts Nos. 29-31.

Where unconstitutional state action threatens a person with injury, there is no adequate remedy at law, and an injunction is appropriate. *Ex parte Young* 209 U.S. 123, 165 (1908).

IX. THERE IS NO ISSUE OF IMMUNITY

The assertion of immunity for the individual defendants is incorrect. State officials are not immune from

suits to enjoin unconstitutional conduct. *Ex parte Young* 209 U.S. 123 (1908). The cases cited by Defendants concern actions for money damages.

X. CONCLUSION

There is no dispute as to the material facts. The procedure for withholding money without a hearing is clearly unconstitutional. Plaintiff respectfully submits that the motion for summary judgment should be granted.

Defendants incorrectly assert that Plaintiff seeks a mandatory injunction. Plaintiff seeks a prohibitory injunction.

Plaintiff seeks a declaration that *Cal. Labor Code* 1727, 1730-1733, 1775, 1776(g) and 1813 are unconstitutional, as these are the statutes that provide for assessment and withholding of penalties and forfeitures without a hearing. Plaintiff seeks an injunction prohibiting Defendants from applying or enforcing the aforesaid statutes against Plaintiff, or on account of alleged violations by Plaintiff. Plaintiff also seeks a declaration that the Notices to Withhold issued on account of alleged violations by Plaintiff are unconstitutional, and of no force and effect.

Alternatively, Plaintiff seeks a declaration that Defendants' application of the aforesaid statutes in unconstitutional, that the Notices to Withhold as to Plaintiff are unconstitutional, and of no force and effect, and for an injunction prohibiting Defendants from applying or enforcing the aforesaid statutes against Plaintiff, or on account of alleged violations by Plaintiff.

Plaintiff does not seek to have the prevailing wage law declared invalid, or to prohibit Defendants from enforcing the law by lawful means.

DATED: October 30, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

(Certificate Of Service Omitted In Printing)

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
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Attorneys for Defendant

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	CASE NO. 95-4839 R (BQRx) MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITION TO MOTION TO DISMISS Date: November 6, 1995 Time: 10 a.m. Courtroom: No. 8 (Filed Oct. 30, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

I

THE DUE PROCESS CLAUSE DOES NOT GUARANTEE PLAINTIFF A PRE-DEPRIVATION HEARING

Plaintiff continues to employ a simplistic due process analysis in its opposition to the motion to dismiss, as though a pre-deprivation hearing must be afforded in all cases regardless of the particular facts. This is plainly not the law, as revealed in the discussions in the very cases upon which plaintiff relies.

For example, in *Fuentes v. Shevin*, 407 U.S. 67 (1972), which plaintiff cites in its opposition, the court pointed out that the most salient factor in the case by case analysis required is the importance of the government interest. A governmental seizure can be justified without a prior hearing where it is shown, *inter alia*, that it is "directly necessary to secure an important governmental or general public interest." 407 U.S. at 66-67.

The California courts have made it clear that the manifold purposes of this statutory scheme include the protection of employees from substandard earnings,

allowing union contractors to compete with nonunion contractors, the benefit to the state of superior efficiency arising from well-paid labor, and the need to compensate nonpublic employees with higher wages since they do not have the steady employment and fringe benefits that public employees enjoy. See *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal. App. 3d 434, 463; 127 Cal. Rptr. 799; *Lusardi v. Aubrey* (1992) 1 Cal. 4th 976, 4 Cal. Rptr. 837.

The Davis-Bacon Act (40 U.S.C. Section 276 (a), et sec.) also provides for withholding of funds from contractors where there are prevailing wages violations. Due process attacks on this practice have been unavailing. The Court in *Ames Construction Co. v. Dole,* 727 F. Supp. 502 (D. Minn. 1989) reviewed the cases which have examined this withholding under due process standards and found that they had uniformly upheld such deprivations as consistent with the Fifth Amendment (See discussion at pp. 13-19 of Opposition to Summary Judgment Motion). The reasoning of those cases is controlling here.

II

PLAINTIFF'S INJURIES, CONSISTING SOLELY OF INDIRECT ADVERSE CONSEQUENCES OF GOVERNMENTAL ACTION, ARE NOT ACTIONABLE

Plaintiff cites allegations in the First Amended Complaint that it has acted as a prime contractor in the past and intends to do so in the future as a means of getting around its dilemma under *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 100 S. Ct. 2467 (1980), since in this case it acted only as a subcontractor

Plaintiff misses the point. The allegations of the First Amended Complaint involve only those situations where plaintiff acted as a subcontractor. The injuries plaintiff has alleged therein flow solely from its status as a subcontractor. The fact that plaintiff might in the future sustain some detriment as a prime contractor due to its indifference to California's prevailing wage laws is absolutely immaterial.

Under no objective examination of the facts in this case can plaintiff be found to have been more than indirectly impacted by the complained of conduct of defendants. This being the case, it finds itself in the same position as the plaintiffs in the *O'Bannon* case and in the cases which have relied on the principle of *O'Bannon.*

III

THE INDIVIDUAL DEFENDANTS ARE IMMUNE FROM SUIT

Without citing a single case that supports the proposition, plaintiff contends that the well-recognized principle of the immunity of public officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person must have known" (*Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727 (1982)) does not apply here because this [sic] not an action for damages.

While it is correct that many of the cases involve actions for damages, defendants are aware of no authority that the application of this well-settled principle of law is limited to such cases. To apply a contrary principle would be unwarranted inasmuch as the same purpose,

the protection of public officers who are simply performing their prescribed duties from suit, is present whether damages are sought or only injunctive or other relief is sought.

IV

PLAINTIFF LACKS STANDING TO PROSECUTE THIS ACTION

The basis for plaintiff's argument that it has standing is simply and solely that it has performed work as a prime contractor in the past and may perform work in that status in the future. (First Amended Complaint, paragraphs 14, 15.) But in the factual circumstances alleged in this action it acted only as a subcontractor.

The logical extension of this theory is that any entity which might perform work as a prime contractor in the future on public works projects has standing to attack the constitutionality of this statutory scheme. Such an argument turns the case and controversy criterion on its head.

It is well settled "that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action . . . " *Ex Parte Levitt*, 302 U.S. 633, 634, 58 S. Ct. 1 (1937) "A hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 90, 67 S. Ct. 556 (147).

Plaintiff tries to take comfort in *Associated General Contractors v. Coalition for Economic Equity*, 950 F. 2d 1401 (1991), where the Ninth Circuit held that an association of

contractors had standing to sue to contest the validity of an ordinance affording preference to minority contractors.

In the *Associated General Contractors* case the Court held that the association met the three pronged test of *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S. Ct. 2434 (1977), since the members of the association had standing to sue on their own inasmuch as they had "firm intentions to bid for San Francisco city contracts." 950 F. 2d at 1401. Plaintiff, in its status as a subcontractor, cannot bid on any contract with a government agency since by definition it deals solely with the general contractor. This case, therefore, in no way supports plaintiff's position.

CONCLUSION

Plaintiff has not standing to maintain this action. Even if it had standing, it could not recover for the indirect adverse consequences of governmental action. Finally, it has not shown that the withholding of monies from its general contractor constituted a deprivation of due process as to plaintiff.

DATED: October 29, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

/s/ Thomas S. Kerrigan
Thomas S. Kerrigan
Attorney for Defendants

(Declaration Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	CIVIL NO. 95-4839 R JUDGMENT **The Honorable Manuel L. Real** (Filed Nov. 7, 1995)

This action came on for hearing before the Court, on November 6, 1995, Honorable Manuel L. Real, District Judge Presiding, on a motion for summary judgment, and the evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered,

It is ordered and adjudged that Plaintiff is awarded declaratory and injunctive relief against Defendants VICTORIA BRADSHAW; LLOYD W. AUBRY, JR.; DANIEL DELLAROCCA; ROGER MILLER; ROSA FRAZIER; DIVISION OF LABOR STANDARDS ENFORCEMENT; and DEPARTMENT OF INDUSTRIAL RELATIONS ("Defendants") as follows:

DECLARATORY RELIEF

1. California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 violate the due process clause of the Fourteenth Amendment to the United States Constitution and, therefore, are invalid.

2. The practice of Defendants of issuing notices to awarding bodies requiring the withholding of monies from contractors due to alleged violations of California prevailing wage laws is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution, and any such notices issued as to alleged violations by Plaintiff are invalid and of no force and effect.

INJUNCTION

3. Defendants are enjoined from applying or enforcing California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i. e., *Cal. Labor Code* §§1720-1861).

Plaintiff shall recover costs of suit.

DATED: NOV-7 1995, 1995

/s/ MANUEL L. REAL
THE HONORABLE
MANUEL L. REAL JUDGE
OF THE UNITED STATES
DISTRICT COURT,
CENTRAL DISTRICT

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) CIVIL NO. 95-4839 R) ORDER DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT **The Honorable Manuel L. Real** DATE: 11-06-1995 TIME: 10:00 a.m. PLACE: Courtroom 8, U.S.D.C. 312 N. Spring St. Los Angeles, CA 90012 (Filed Nov. 7, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

The motion of Defendants to dismiss Plaintiff's complaint came on regularly for hearing on November 6, 1995, at 10:00 a.m. in Courtroom 8 of the above entitled Court, the Honorable Manuel L. Real presiding. Having considered all papers and arguments:

IT IS HEREBY ORDERED that the motion is denied.

DATED: NOV-7 1995, 1995

/s/ MANUEL L. REAL
THE HONORABLE
MANUEL L. REAL JUDGE
OF THE UNITED STATES
DISTRICT COURT,
CENTRAL DISTRICT

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC.,

Plaintiff,

vs.

VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official

CIVIL NO. 95-4839 R

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The Honorable Manuel L. Real

(Filed Nov. 7, 1995)

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

The motion of Plaintiff G & G FIRE SPRINKLERS, INC. for summary judgment came on regularly for hearing before this Court on November 6, 1995 and Stephen A. Seideman appeared as attorney for Plaintiff and Thomas Kerrigan appeared as attorney for Defendants VICTORIA BRADSHAW; LLOYD W. AUBRY, JR.; DANIEL DELLAROCCA; ROGER MILLER; ROSA FRAZIER; DIVISION OF LABOR STANDARDS ENFORCEMENT; and DEPARTMENT OF INDUSTRIAL RELATIONS.

After considering the moving and opposition papers, and all other matters presented to the Court, and for the reasons that California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813, and Defendants' assessment of penalties and issuance of notices requiring withholding of payment due to alleged violations of California prevailing wage laws, violate the due process clause of the Fourteenth Amendment of the United States Constitution and cause irreparable injury and substantial threat of irreparable injury to Plaintiff for which there is no adequate remedy at law, the motion is granted.

Judgment shall be entered for declaratory relief as requested in the Plaintiff's motion and enjoining Defendants from applying or enforcing California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i. e., *Cal. Labor Code* §§1720-1861).

DATED: NOV-7 1995, 1995

/s/ MANUEL L. REAL
THE HONORABLE
MANUEL L. REAL JUDGE
OF THE UNITED STATES
DISTRICT COURT,
CENTRAL DISTRICT

(Certificate Of Service Omitted In Printing)

DIVISION OF LABOR STANDARDS ENFORCEMENT
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Attorneys for the Labor Commissioner

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) Case No. 95-4839 R (BQRx)) OBJECTIONS TO ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

Defendants herein object to the proposed Order Granting Motion for Summary Judgment and to the proposed Judgment, both of which were lodged with the Court and served on defendants on November 7, pursuant to Local Rule 14.6, as follows:

I. Objections to Order Granting Motion for Summary Judgment

a. P.2, lines 9 through 16, beginning with the words "and for the reasons that" and ending with the words " no adequate remedy at law."

b. P. 2, lines 18 through 21, beginning with the words "for declaratory relief as requested" and ending with the words "and 1813."

II. Objections to Judgment

a. P. 2, lines 7 through 9, beginning with the word "Victoria" and ending with the word "Frazier."

b. P. 2, line 13 through 15.

c. P. 2, lines 16 through 22.

d. P. 3, lines 2 through 6.

The foregoing objections are based on the legal grounds enumerated in the attached Memorandum of Points and Authorities filed in support thereof. Defendants request that the Court set these Objection for a hearing.

Dated: November 13, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California –

By: Thomas S. Kerrigan
Michael Villeneuve

/s/ Thomas S. Kerrigan
Thomas S. Kerrigan
Attorney for the Labor Commissioner

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DIVISION OF LABOR STANDARDS ENFORCEMENT
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) Case No. 95-4839 R (BQRx)) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO JUDGMENT AND ORDER

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

I

INTRODUCTION

Plaintiff, a subcontractor on certain public works projects, attacked the constitutionality of the practice of the State of California in issuing Notices to Withhold to the awarding bodies on account of the failure of plaintiff to pay prevailing wages to its employees without first giving either the prime contractor or plaintiff a formal hearing. As plaintiff alleges in its First Amended Complaint, "Prior to issuing the Notices mentioned in Paragraph 16, above, Defendants did not provide Plaintiff, or the Prime Contractors who employed Plaintiff with any hearing with respect to the allegations or potential forfeitures or penalties, or with respect to the reasons for them, or with respect to the total of the alleged amounts due." (Para. 17, p. 6).

Plaintiff argues, likewise, in its Motion for Summary Judgment that defendants have violated its constitutional rights by not granting a hearing prior to issuing the Notices to Withhold. The Court granted the motion for summary judgment on that basis.

The proposed orders submitted by plaintiff, however, go well beyond seeking to prohibit this practice of issuing these notices without a hearing. The proposed injunction would foreclose the State of California "from applying or enforcing California Labor Code Sections 1727, 1730-1733, 1775, 1776 (g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i.e., Cal. Labor Code Sections 1720-1861)." The proposed order granting summary judgment and the proposed judgment itself would declare each of these sections unconstitutional and unenforceable, regardless of whether or not hearings are afforded in the future and despite the fact, as conceded by plaintiff, that these statutes are directly applicable only to the prime contractors with which plaintiff contracted.

Since the alleged vice of defendants is not in enforcing the statutory scheme, but in failing to give plaintiff or its prime contractor a hearing prior to issuing the Notices to Withhold, the relief is vastly overbroad. The proposed order and judgment would have the effect of exempting plaintiff from compliance with the law, according it a special status not enjoyed by any other contractor, to the detriment of the interests of its workers and the general public. Moreover, defendants contend that the submission of the proposed order and judgment, which in effect would authorize plaintiff to operate its business outside the law, is nothing less than an instance of plaintiff consciously overreaching in an effort to secure an improper competitive advantage.

Local Rule 14.6 provides that opposing counsel may file and serve objections to a proposed order or judgment within five court days of service of the proposed order or

judgment. The proposed order and proposed judgment in this case was served by plaintiff on November 7, 1995. On November 13, 1995, a day before the time for making such objections expired, defendant's counsel was surprised to receive in the mail from the Clerk of the Court a copy of the order and judgment signed by the Court on November 7, 1995.

II

THE PROPOSED ORDERS ARE FATALLY OVERBROAD AND SHOULD NOT ISSUE

Seeking to capitalize on the Court's announced decision to grant its motion for summary judgment, plaintiff has submitted proposed orders which, if entered, would invalidate the statutory scheme with respect to its operations, going well beyond any relief to which plaintiff is entitled.

It is a well-settled principle of federal law that injunctive relief is a drastic remedy and therefore any injunction must be narrowly tailored to give only the relief to which a plaintiff is clearly entitled. *Califano v. Yamasaki* (1979) 442 U.S. 682, 702, 99 S. Ct. 2545; *Orantes-Hernandez v. Thornburg.*, 919 F.2d 549, 558 (9th Cir. 1990).

Here, it is not the provisions of the Labor Code enumerated in the proposed order and judgment that plaintiff has any legitimate complaint about, it is only the enforcement policy and practice, not specified in these statutes, that has denied plaintiff a hearing prior to the issuance of the Notices of Withholding. Assuming, *arguendo*, the correctness of plaintiff's position, the most plaintiff should be entitled to, if injunctive relief is to

issue at all, is an injunction against withholding of funds without first granting a hearing to interested parties. Plaintiff cannot use an alleged infirmity in agency policy as an opportunity for a wholesale scrapping of a long standing statutory scheme designed for the public welfare.

The substance of the provisions being attacked may be briefly summarized. Labor Code Section 1727 merely provides for the withholding of payments to prime contractors after an investigation where such payments have been "forfeited" within the meaning of the law. This section, on its face, does not prohibit the holding of hearings prior to withholding. Sections 1730-1733 merely provide for suits by contractors to recover wages. The invalidation of these sections is not necessary to protect plaintiff interests. Section 1775, interestingly enough, provides for a right of action on behalf of the State to collect penalties for violations by a contractor. This is obviously consistent with due process and cannot rationally be enjoined. Section 1776(g) provides for penalties for payroll record violations and withholding of the sums penalized. Again there is nothing in this section that prohibits the State from granting a hearing prior to withholding. Section 1813 provides only for the enforcement of overtime provisions of California law without any specification within the section itself for withholding. To summarize, nothing in these provisions provide for deprivation without a hearing.

Not only is the proposed order and injunction overbroad, it is also inimical to the public interest since it excuses plaintiff from compliance with longstanding minimum labor standards. Traditional equitable grounds for

the issuance of an injunction include analysis of the impact of the requested relief on the public interest. *U.S. v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 176 (9th Cir. 1987); *American Motorcycle Association v. Watt*, 744 F.2d 962, 966.

Plaintiff cannot be relieved of the duty owed by all other public works contractors to comply with the established minimum labor standards of this State. To permit it to do so by issuing this proposed order and injunction merely because of a past policy of not having pre-deprivation hearings which this Court finds necessary would constitute a miscarriage of justice.

III

THIS IS NOT A PROPER CASE FOR INJUNCTIVE RELIEF

The proposed order calls for an injunction against each of the defendants. There are legally sound reasons for denying this kind of drastic relief. These reasons include, *inter alia*, the lack of irreparable injury since a sum certain is all that is in question, the dubious nature of plaintiff's claim, the lack of standing of plaintiff based on lack of privity of contract, and the immunity of the individual defendants from suit.

"When a district court imposes a preliminary injunction on a state agency, a strong factual record is necessary; our review of the injunction must be more rigorous than when we review an injunction against a state as opposed to a federal agency, since the Supreme court requires a showing of an intentional and pervasive pattern of misconduct in order to enjoin a state agency."

Thomas v. City of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992).

Plaintiff has allegedly lost payments of $135,000.00 withheld from the prime contractor and allegedly deducted by the prime contractor from payments due plaintiff. (First Amended Complaint, p. 6).

Since plaintiff cannot satisfy its burden to show that it does not have an adequate remedy at law, no injunction should issue. *Stanley v. University of Southern California*, 13 F 3d 1313 (9th Cir. 1994); *Caribbean Marine v. Baldridge*, 844 F.2d 668 (9th Cir. 1988)

Defendants have maintained throughout this case that plaintiff does not possess a tenable due process claim. As has already been pointed out, there is abundant authority for the proposition that claims under public contracts do not rise to the stature of due process deprivations.

In *S.D. Maintenance v. Goldin*, 844 F.2d 962 2nd Cir. 1988) the plaintiff sued the City of New York for withholding payments during an audit period, claiming the withholding constituted a violation of due process. Denying the claim, the court found no due process entitlement:

"Other courts of appeals have also been reluctant to surround the entire body of public contracts rights with due process protections. See, e.g., *San Bernardino Physicians Services Medical Group, Inc. v. County of San Bernardino*, 825 F. 2d 1404 (9th Cir. 1987) (denying due process protection for contractual right to supply medical services for four-year term); *Brown v. Brienen, supra* (expressing doubt that

due process protection extends to contractual right to compensatory time off); *Casey v. Petrillo*, 697 F. 2d 22, 23 (1st Cir. 1983) (per curiam); *Manning v. Lockhart*, 623 F. 2d 536, 538 (8th Cir. 1980) (per curiam)" 844 F. 2d at 967.

As pointed out by the Ninth Circuit in the *San Bernardino Physicians Services* Case, "[i]t is neither workable nor within the intent of 1983 to convert every breach of contract claim against a state into a federal claim." The court added that "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contract". 825 F. 2d 1404, 1408-1410 (9th Cir. 1987).

In *Reich v. Beharry*, 883 F.2d 239 (3d Cir. 1989) the court expressed similar concerns:

"So far as we are able to determine, every court of appeals that has directly confronted the issue has concluded that although state contract law can give rise to a property interest protectible by procedural due process, not every interest held by virtue of a contract implicates such process. Many . . . courts have observed that if every breach of contract by someone acting under color of state law constituted a deprivation of property for procedural due process purposes, the federal courts would be called upon to pass judgment on the procedural fairness of the processing of a myriad of contractual claims against public entities. We agree that such a wholesale federalization of state public contract law seems far afield from the great purposes of the due process clause." 833 F 2d. at 242 (citations omitted).

It is well settled that a qualified immunity shields public officials where conduct "does not violate clearly

establishes statutory or constitutional rights of which a reasonable person must have known." *Harrlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635, 6390640, 107 S. Ct. 3034 (1987); *Erickson v. U.S.*, 976 F. 2d 1299, 1301 (9th Cir. 1992).

Plaintiff's declarations make no showing concerning the knowledge or lack of knowledge of the individual defendants concerning the validity of these statutes. Having failed to so show, it cannot be heard to request injunctive relief against them.

Plaintiff accordingly cannot be heard to urge this Court to issue wide-ranging injunctive relief in a situation where its due process claim is at best questionable.

CONCLUSIONS

For the reasons stated herein, defendants request that its objections to the proposed order and proposed judgment be sustained and that no injustice relief issue against defendants.

DATED: November 13, 1995

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: Thomas S. Kerrigan
Michael Villeneuve

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	) Case No. CV 95-4839 R(BQRx)) NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT) (Filed November 16, 1995)

Defendants herein, Victoria Bradshaw, Lloyd W. Aubry, Jr., Daniel Dellarocca, Roger Miller, Rosa Frazier, Division of Labor Standards Enforcement, and Department of Industrial Relations, appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment of the district court, filed in this case on November 7, 1995, and all previously and simultaneously entered interlocutory orders and decisions of the court.

DATED: November 15, 1995

Thomas S. Kerrigan
Michael Villeneuve
DIVISION OF LABOR
STANDARDS ENFORCEMENT
Department of Industrial
Relations State of California

By: /s/ Thomas S. Kerrigan
Thomas S. Kerrigan
Attorney for Defendants

(Declaration Of Service Omitted In Printing)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official	) CIVIL NO. 95-4839 R) PLAINTIFF'S RESPONSE TO DEFENDANTS' OBJECTION TO ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT **The Honorable Manuel L. Real**

capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20,

Defendants.

Defendants' objections to the order granting motion for summary judgment and judgment are without merit. Defendants' counsel has stated that Defendants intend to make a motion to modify the judgment. Plaintiff assumes that no specific response is necessary unless, and until, Defendants make such a motion. If it would be appropriate, or necessary, for Plaintiff to submit a specific response to the objections served by Defendants, Plaintiff requests that it be provided with an opportunity to do so. Otherwise, it is Plaintiff's understanding that the issue would be addressed by the Court only upon the filing of an appropriate motion by Defendants.

DATED: November 1995

LEVIN, STEIN, CHYTEN
& SCHNEIDER

By: /s/ [Illegible]
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